Supreme Court, U.S.
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NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

KAREN BRUNSON,
SUPERINTENDENT, CLALLAM BAY
CORRECTIONS CENTER,

Petitioner,

v.

JERRY L. HARRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year limitation period for a person in custody pursuant to the judgment of a state court to apply to a federal court for a writ of habeas corpus. 28 U.S.C. § 2244(d). In § 2244(d), Congress expressly identified when the limitations period begins and when this one year limit is tolled.

1. In light the fact that Congress provided for when the limitations period in § 2244(d) is tolled, is the one-year limitation period also subject to judicially-created equitable tolling?

2. If the one-year limitation period is subject to equitable tolling, does the decision not to timely apply for federal habeas corpus relief, but to instead file successive petitions for state collateral review after the time limit for seeking state court review has expired, constitute an extraordinary circumstance to justify equitable tolling?

PARTIES

The petitioner is Karen Brunson, the Superintendent of the Clallam Bay Corrections Center. Ms. Brunson is the successor in office to Sandra Carter who was the respondent-appellee in the court of appeals, and she is substituted pursuant to Supreme Court Rule 35.3.

The respondent is Jerry L. Harris. Mr. Harris was the petitioner-appellant in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Karen Brunson, Superintendant of the Clallam Bay Corrections Center, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008) (App. 1a). The court of appeals order denying a timely petition for rehearing en banc is unpublished (App. 14a). The order of the United States District Court for the Western District of Washington is unpublished (App. 15a). The report and recommendation of the United States Magistrate Judge is unpublished (App. 17a). The opinion of the Washington court of appeals denying Harris' first post-conviction collateral challenge is unpublished (App. 32a). The Washington Supreme Court Commissioner's order denying review of the Washington court of appeals opinion is unpublished (App. 59a). The Washington Supreme Court's order denying Harris' motion to modify the Commissioner's order denying review of the Washington court of appeals opinion is unpublished (App. 63a). The Washington Supreme Court Commissioner's order denying Harris' second post-conviction collateral challenge is unpublished (App. 64a). The Washington Supreme Court's order denying Harris' motion to modify the Commissioner's order denying his second post-conviction collateral challenge is unpublished (App. 67a). The

Washington Supreme Court Commissioner's order denying Harris' third post-conviction collateral challenge is unpublished (App. 68a). The Washington Supreme Court's order denying Harris' motion to modify the Commissioner's order denying his third post-conviction collateral challenge is unpublished (App. 73a).

JURISDICTION

The judgment of the court of appeals was entered February 8, 2008. A timely petition for rehearing en banc was denied March 14, 2008. On June 2, 2008, Justice Kennedy granted an extension of time in which to file a petition for writ of certiorari to and including July 14, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2244(d) provides[1]:

> "(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > "(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

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[1] The complete text of 28 U.S.C. § 2244 and 28 U.S.C. § 2254 are set out in the Appendix at 74a and 78a, respectively.

> "(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> "(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> "(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> "(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d).

STATEMENT

Jerry Harris was convicted of aggravated first-degree murder for killing Rene Vivas and sentenced to life in prison without parole. The Washington Court of Appeals affirmed Harris' conviction, and on February 29, 2000, the Washington Supreme Court denied his petition for review of the court of appeals decision. App. 31a. Harris' conviction became final,

for purposes of 28 U.S.C. § 2244(d)(1)(A), 90 days later on May 29, 2000.

1. Post-Conviction Collateral Review In Washington

Washington law provides for collateral review of criminal convictions. Washington Rules of Appellate Procedure 16.3–16.15. However, "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final[.]" Wash. Rev. Code § 10.73.090, App. 82a. For purposes of state collateral review, a conviction is final when the appellate court issues its mandate or this Court denies a timely petition for a writ of certiorari. Wash. Rev. Code § 10.73.090(3)(b), (c), App. 82a. The one-year limitation does not apply if the collateral attack on the judgment and sentence is based solely on the grounds of "[n]ewly discovered evidence," that the "statute that the defendant was convicted of violating was unconstitutional," that the "conviction was barred by double jeopardy," that the "defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction," that the "sentence imposed was in excess of the court's jurisdiction," or that there "has been a significant change in the law, whether substantive or procedural, which is material to the conviction [or] sentence[.]" Wash. Rev. Code § 10.73.100(1)–(6), App. 83a. Thus, unless Harris met one of the six exceptions to the one-year limitation period, he had to seek collateral review of his conviction and sentence in state court by May 10, 2001, one year after the court of appeals issued its mandate.

On February 20, 2001, 346 days after his conviction became final for state purposes, Harris filed his first personal restraint petition in the Washington Court of Appeals. On August 25, 2003, the court of appeals affirmed his conviction. App. 32a. Harris sought review of the court of appeals decision in the Washington Supreme Court. On December 8, 2003, the Washington Supreme Court Commissioner entered an order denying review of the court of appeals decision.[2] App. 59a. On February 4, 2004, the Washington Supreme Court denied Harris' motion to modify the Commissioner's ruling. App. 63a.

On March 3, 2004, Harris filed his second personal restraint petition in the Washington Supreme Court. This second petition was filed after the one-year limitation period, which expired on March 10, 2001. To avoid the one-year limitation, Harris argued that his second petition fell within the significant change in the law exception in Wash. Rev. Code § 10.73.100(6). The Commissioner concluded that Harris' second petition was time-barred because it did not fall within the significant change in the law exception. On July 27, 2004, the Commissioner dismissed Harris' second petition. App. 64a. On

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[2] The Commissioner is a staff member appointed by the Supreme Court. Washington Supreme Court Administrative Rule 15(a). The Commissioner is authorized to hear and decide motions, including motions for discretionary review of decisions of the Washington Court of Appeals. Washington Supreme Court Administrative Rule 15(a); Washington Rule of Appellate Procedure 17.2. A person aggrieved by the Commissioner's ruling may make a motion to modify the ruling that will be decided by the Supreme Court.

October 5, 2004, the Washington Supreme Court denied Harris' motion to modify the Commissioner's ruling. App. 67a.

On October 11, 2004, Harris filed his third personal restraint petition in the Washington Supreme Court. Harris claimed that his petition fell within the significant change in the law exception to the one-year limitation period. The Commissioner rejected this argument. On March 14, 2005, the Commissioner dismissed Harris' third petition as time-barred. App. 68a. On June 1, 2005, the Washington Supreme Court denied Harris' motion to modify the Commissioner's decision. App. 73a.

2. Federal Habeas Corpus

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), the federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court[.]" 28 U.S.C. § 2254. A one-year period of limitation applies "to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). The limitation period runs from the latest of four possible dates: "the date on which the judgment became final"; "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed"; "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; or "the date on which the

factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A)–(D).

In addition to the four different dates for starting to calculate the one-year limitation, Congress provided for tolling the limitation period. "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). The limitation is only subject to tolling if the application is properly filed. In *Artuz v. Bennett*, 531 U.S. 4 (2000), the Court held that "an application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example . . . the time limits upon its delivery[.]" *Artuz*, 531 U.S. at 8. The Court "express[ed] no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Id.* at 8 n.2.

The circuit court of appeals reached different conclusions about the question reserved by the Court in *Artuz*. For example, in *Merritt v. Blaine*, 326 F.3d 157, 159 (3d Cir. 2003), the Third Circuit held "that an untimely application for state post-conviction relief by a petitioner, who sought but was denied application of a statutory exception to the . . . time bar, is not 'properly filed' under 28 U.S.C. § 2244(d)(2)." On the other hand, the Ninth Circuit held "that if a state's rule governing the timely commencement of state postconviction relief petitions

contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.'" *Dictado v. Ducharme*, 244 F.3d 724, 727–28 (9th Cir. 2001). In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Court resolved this circuit conflict. *Pace* held "that time limits, no matter their form, are 'filing' conditions. Because the state court rejected petitioner's . . . petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2)." *Pace*, 544 U.S. at 417.

Pace was decided April 27, 2005. On May 8, 2005, Harris filed an application for a writ of habeas corpus in the United States District Court for the Western District of Washington. The State filed a motion to dismiss, arguing that Harris' petition was time-barred under 28 U.S.C. § 2244(d)(1), and that Harris was not entitled to equitable tolling of the limitation. The United States Magistrate Judge recommended granting the motion. According to the Magistrate Judge, "it is undisputed that [Harris'] first [personal restraint petition] tolled the statute of limitations because it was filed on February 20, 2001, slightly more than three months before his one-year limitations period for filing a federal habeas petition expired." App. 27a. Thus, the "limitations period remained tolled until February 4, 2004, the date the state supreme court denied petitioner's motion to modify the court commissioner's ruling denying petitioner's motion for discretionary review." App. 27a. In addition, Harris did "not challenge [the state's] argument that under *Pace*, neither of petitioner's last two [personal restraint petitions]

were 'properly filed' because the state supreme court commissioner ruled that they were untimely." App. 27a. Accordingly, "under *Pace v. DiGuglielmo*, neither of the last two [personal restraint petitions] operated to further toll the one-year limitations period under § 2244(d)(2)." App. 27a.

The Magistrate Judge also concluded that Harris was not entitled to equitable tolling of the one-year time limit in 28 U.S.C. § 2244(d)(1). Harris argued that he was "entitled to equitable tolling because he justifiably relied on the pre-*Pace* controlling precedent in the Ninth Circuit, *Dictado v. DuCharme*, 244 F.3d 724 (9th Cir. 2001)[.]" App. 28a. The Magistrate Judge rejected this argument. She concluded that Harris had "not identified any extraordinary circumstances 'beyond his control' that made it *impossible* for him to file a timely federal habeas petition. The fact that *Dictado* was controlling Ninth Circuit law pre-*Pace*, in no way precluded or made it 'impossible' for petitioner to seek federal habeas relief." App. 29a. Harris "was free to file his federal habeas petition at any time after his state court judgment became final, and the decision to delay pursuing federal remedies was not beyond petitioner's or his counsel's control." App. 29a. The Magistrate Judge pointed out that Harris could have avoided this problem by "filing a 'protective petition' in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." App. 29a–30a.

The District Court Judge accepted the recommendations of the Magistrate Judge. App. 15a. Harris filed a timely notice of appeal, but the district

court then entered an order denying Harris' motion for a certificate of appealability. The Ninth Circuit granted Harris' request for a certificate of appealability on the sole issue of whether Harris was entitled to equitable tolling of the one-year period of limitation imposed by 28 U.S.C. § 2244(d).

The Ninth Circuit reversed the district court. The court began by holding that 28 U.S.C. § 2244(d) allows for equitable tolling. According to the court, "[a]lthough the Supreme Court has never explicitly decided whether § 2244(d) allows for equitable tolling, *see Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), we hold that it does, *see, e.g., Espinoza-Matthews*, 432 F.3d at 1026." App. 7a n.4.

The State argued that "that Harris should be held responsible for the consequences of his own litigation choices, and should not be rescued from having made a poor tactical decision." App. 8a (internal quotation marks omitted). The court of appeals rejected this argument. The Ninth Circuit concluded that the "State's argument ignore[d] the rationale behind the principle of equitable tolling [which] is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." App. 8a (internal quotation marks omitted). Thus, "[e]quitable tolling is typically granted when litigants are unable to file timely petitions as a result of external circumstances beyond their direct control." App. 9a. According to the court, the "fact that Harris *could* have filed a timely federal habeas petition at a certain point in time is not dispositive. The critical fact here is that Harris relied in good faith on then-binding circuit precedent in making his

tactical decision to delay filing a federal habeas petition." App. 9a. Thus, "Harris' failure to file a timely petition is not the result of oversight, miscalculation or negligence on his part, all of which would preclude the application of equitable tolling." App. 9a. "Harris was undoubtedly aware of when AEDPA's statute of limitations would expire under our rule in *Dictado* [and he] presumably chose his tactical strategy precisely *because* he believed that, under *Dictado*, he could pursue relief in state courts without jeopardizing his ability to file a federal habeas petition." App. 9a. The Ninth Circuit concluded that Harris was entitled to equitable tolling because the "Supreme Court's overruling of the *Dictado* rule made it impossible for Harris to file a timely petition." App. 9a. "Harris' petition became time-barred the moment that *Pace* was decided." App.9a–10a.

A timely petition for rehearing en banc was denied March 14, 2008. On June 2, 2008, Justice Kennedy granted an extension of time in which to file a petition for writ of certiorari to and including July 14, 2008.

REASON FOR GRANTING THE PETITION

This case presents the questions of whether the one-year statute of limitations to file a federal habeas corpus petition in § 2244(d)(1) is subject to equitable tolling and, if the limitation is subject to tolling, what constitutes the extraordinary circumstances required to lift the bar? There are three reasons why the petition should be granted. First, the question of whether § 2244(d)(1) is subject to equitable tolling has been expressly left open by

the Court in *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), and *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005). It is important that the Court resolve this question. Substantial state and judicial resources go into determining whether a petition barred by the statute of limitations is subject to tolling.

Second, eleven circuits of the courts of appeals have held that § 2244(d)(1) is subject to equitable tolling. However, the reasoning of these courts is inconsistent with the jurisprudence of this Court. The circuit courts' analysis is limited to deciding whether § 2244(d)(1) is jurisdictional or a statute of limitations. Upon concluding that it is a statute of limitations, the courts assume that it is subject to tolling. This Court requires more than simply putting a label on the statute. To determine if § 2244(d)(1) is subject to tolling, one must analyze the purpose and language of the statute. This lead to the conclusion that it is not subject to tolling.

Third, if § 2244(d)(1) is subject to tolling, the Court needs to provide guidance about what constitutes the extraordinary circumstances that justify ignoring the statute of limitations. In this case, the Ninth Circuit concluded that Harris' failure to meet the one-year limitation period constituted extraordinary circumstances, even though it was a result of a tactical decision made by Harris.

1. The Court Has Expressly Left Open The Question Of Whether Equitable Tolling Applies To The Statute Of Limitations In § 2244(d)(1)

The Court has expressly left open the question of whether equitable tolling applies to the one-year statute of limitations in § 2244(d)(1). *Lawrence*, 127 S. Ct. at 1085 ("We have not decided whether § 2244(d) allows for equitable tolling. Because the parties agree that equitable tolling is available, we assume without deciding that it is." (Citation omitted.)); *Pace*, 544 U.S. at 418 n.8 ("We have never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations."); *Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("We . . . have no occasion to address the question that Justice Stevens raises concerning the availability of equitable tolling."); *id.* at 184 (Stevens, J. concurring) ("As a result, equitable considerations may make it appropriate for federal courts to fill in a perceived omission on the part of Congress by tolling AEDPA's statute of limitations for unexhausted federal habeas petitions. Today's ruling does not preclude that possibility, given the limited issue presented in this case and the Court's correspondingly limited holding.")

Eleven of the federal circuit courts of appeal have concluded that § 2244(d)(1) is subject to equitable tolling. Only the District of Columbia Circuit has yet to rule on this issue. *See infra* p. 16–18. For this reason, this issue will not likely come before the Court to resolve a circuit conflict.

Nevertheless, the Court has left the question open. Continuing to allow federal courts to apply unspecified, judicially-created equitable tolling to AEDPA's statute of limitations, unsanctioned and unchecked by this Court, imposes a tremendous burden on state and judicial resources.[3] Presumably, every inmate who is subject to the one-year statute of limitations will argue that he or she is entitled to equitable tolling of the limitation.[4]

Moreover, the inquiry is often factually intensive, requiring a hearing in the district court. *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) ("A habeas petitioner like Roy or Kephart should receive an evidentiary hearing when he makes a good-faith

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[3] It is difficult to quantify the extent to which federal courts consider equitable tolling of the AEDPA statute of limitations. However, one indication is that a Westlaw query of "equitable +1 tolling & AEDPA" in the ALLFEDS database for 2007 results in 1,632 cases. Undoubtedly, some of these cases do not in fact involve the court's resolution of a claim for equitable tolling. But this is an indication of state and federal court resources involved in resolving the tolling issue. The same query run for the year 2006 resulted in 1,365 cases.

[4] Examples of the many and varied circumstances that have been asserted as grounds for equitable tolling include attorney negligence, *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002); conduct of other prison inmates, *Paige v. United States*, 171 F.3d 559, 560–61 (8th Cir. 1999); the petitioner's legal abilities, *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000); the petitioner's language abilities, *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002); the availability of transcripts to the petitioner, *Gassler v. Bruton*, 255 F.3d 492, 495 (8th Cir. 2001); the petitioner's physical or mental illness, *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003); and the confiscation of the petitioner's legal papers, *Valverde v. Stinson*, 224 F.3d 129, 133–35 (2d Cir. 2000).

allegation that would, if true, entitle him to equitable tolling." (Internal quotation marks omitted.)); *Fleming v. Evans*, 481 F.3d 1249, 1256–57 (10th Cit. 2007) (petitioner "has alleged enough facts to warrant, at a minimum, an evidentiary hearing to determine whether he is entitled to equitable tolling"); *Downs v. McNeil*, 520 F.3d 1311, 1325 (11th Cir. 2008) ("Ultimately, whether equitable tolling is warranted is a decision that must rest on facts, not allegations. On remand, the district court should conduct an evidentiary hearing to determine whether the facts Downs has alleged are true, and to make any additional factual findings relevant to the equitable tolling analysis."); *Rivera v. Quarterman*, 505 F.3d 349, 354 (5th Cir 2007) ("Accordingly, we vacate Judge Vela's order denying the state's motion and remand to the district court with instruction to hold an evidentiary hearing, make specific findings, and rule on the issue of equitable tolling."); *Keenan v. Bagley*, 400 F.3d 417, 422 (6th Cir. 2005) ("Whether this case presents one of those rare occasions in which equitable tolling under AEDPA is proper is an issue appropriately handled by the district court in the course of an evidentiary hearing.").

Given the state and judicial resources required to resolve the issue of equitable tolling, the Court should answer the question it has left open.

2. The Courts Of Appeal Decisions Approving Equitable Tolling Are Inconsistent With This Court's Jurisprudence

Eleven circuit courts have concluded that § 2244(d)(1) is subject to equitable tolling. Only the District of Columbia Circuit has yet to decide the

issue. However, the reasoning of these decisions is simplistic and inconsistent with this Court's jurisprudence. These courts have concluded that § 2244(d)(1) is subject to tolling, simply because the one-year limitation is a statute of limitations and is not jurisdictional. *Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004) ("We hold that the one-year limitations period in § 2244(d)(1) is not jurisdictional and, accordingly, can be subject to equitable tolling in appropriate cases."); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) ("However, other circuits considering this issue uniformly have held that the one-year period is a statute of limitations rather than a jurisdictional bar so that courts may equitably toll the period. We join our sister circuits and also adopt this rule." (Citations omitted.)); *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 617–18 (3d Cir. 1998) ("Time limitations analogous to a statute of limitations are subject to equitable modifications such as tolling . . . . On the other hand, when a time limitation is considered jurisdictional, it cannot be modified and non-compliance is ar absolute bar. . . . As the Ninth Circuit recognized, the language of AEDPA clearly indicates that the one year period is a statute of limitations and not a jurisdictional bar."); *Harris v. Hutchinson*, 209 F.3d 325, 328–29 (4th Cir. 2000) ("As a general matter, principles of equitable tolling may, in the proper circumstances, apply to excuse a plaintiff's failure to comply with the strict requirements of a statute of limitations. But these principles may not apply to overcome a jurisdictional bar, where strict satisfaction of a time limit may be required as a precondition to jurisdiction over a

matter. This conclusion is supported by both the language of the AEDPA itself—the limitations provisions do 'not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" (Citations omitted.)); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) ("AEDPA's statutory language and construction clearly evinces a congressional intent to impose a one-year statute of limitations for the filing of federal habeas claims by state prisoners. We hold, therefore, that the one-year period of limitations in § 2244(d)(1) of AEDPA is to be construed as a statute of limitations, and not a jurisdictional bar. As such, in rare and exceptional circumstances, it can be equitably tolled."); *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004), ("Because AEDPA's one-year statute of limitations is not jurisdictional, a petitioner who misses the deadline may still maintain a viable habeas action if the court decides that equitable tolling is appropriate."); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) ("the one-year deadline is not jurisdictional and therefore the judge-made doctrine of equitable tolling is available"); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) ("However, because the one-year time limit contained in section 2244(d)(1) is a statute of limitation rather than a jurisdictional bar, equitable tolling, if applicable, may apply."); *Calderon v. U.S. Dist. Court for the Cent. Dist. of California*, 128 F.3d 1283, 1289 (9th Cir. 1997) ("Section [2244(d)(1)]'s one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar."); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) ("It must be remembered that § 2244(d) is not jurisdictional and as a limitation

may be subject to equitable tolling."); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) ("Section 2244 is a statute of limitations, not a jurisdictional bar. Therefore, it permits equitable tolling[.]"); *United States v. Pollard*, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005) ("Eleven circuits have concluded that, under certain circumstances, equitable tolling of the statute of limitations in either § 2255 for federal prisoners and/or § 2244(d)(1) for state prisoners is possible. This circuit has yet to decide the question, and there is no need to do so here." (Citations omitted.)).

Contrary to the conclusion of the courts of appeal, this Court has never adopted a rule that statutes of limitations are always subject to equitable tolling. The "basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.'" *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426 (1965) (alteration in original); *Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (same). The "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998).

The fact that a limitation is not jurisdictional is not dispositive. This is because there are different kinds of statutes of limitations. "Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008). The "law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject

to rules of forfeiture and waiver." *John R. Sand & Gravel Co.*, 128 S. Ct. at 753. "Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations." *Id.*

However, other statutes of limitations "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims[.]" *Id.* "The Court has often read the time limits of these statutes as more absolute, say *as requiring a court to decide* a timeliness question despite a waiver, or *as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period.*" *Id.* (emphasis added). "As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as 'jurisdictional.'" *Id.*

It is not the label of the statute that determines whether it is subject to equitable tolling. Rather, one must examine the purpose and language of a statute to determine the intent of Congress.

The purpose of AEDPA is inconsistent with equitable tolling. Habeas corpus is a civil action. *Browder v. Director, Dep't of Corrections of Illinois*, 434 U.S. 257, 265 n.9 (1978). But, it is not similar to a lawsuit between private litigants. Unlike statutes of limitations designed to protect defendants against stale or unduly delayed claims, AEDPA was adopted to serve important goals related to the criminal justice system. In enacting AEDPA, "Congress wished to curb delays, to prevent retrials on federal habeas, and to give effect to state convictions to the

extent possible under law[5] to further the principles of comity, finality, and federalism.[6]" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citations omitted). To further these goals, Congress "adopted a tight time line, a one-year limitation period ordinarily running from 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review,' 28 U.S.C. § 2244(d)(1)(A)." *Mayle v. Felix*, 545 U.S. 644, 662 (2005).

The language of § 2244(d) also does not support the notion that it is subject to equitable tolling. "Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception." *United States v. Brockamp*, 519 U.S. 347, 350 (1997). However, the language of § 2244(d) is complex. Moreover, it is significant that the complexity in § 2244(d) comes from the fact that Congress included three different ways to toll the one-year statute of limitations, in addition to tolling available in § 2244(d)(2) for time during which a properly filed application for State post-conviction or other collateral review is pending. The fact that Congress provided for tolling under certain circumstances is an indication that that was all the tolling it intended. *Beggerly*, 524 U.S. at 48–49 ("Here, the [Quiet Title Act], by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,' has already effectively allowed for

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[5] *Williams v. Taylor*, 529 U.S. 362, 386 (2000).

[6] *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

equitable tolling. Given this fact, and the unusually generous nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted." (Citation omitted.)).

First, under § 2244(d)(1)(B) an extended limitations period will apply to the entire petition if the prisoner's ability to file the petition was impeded "by State action in violation of the Constitution or laws of the United States," as long as the prisoner was diligent (i.e., filed within one year) after the impediment was removed. 28 U.S.C. § 2244(d)(1)(B).

Second, under § 2244(d)(1)(C) individual claims may be presented, even if others are barred, if this Court recognizes a new right and immediately and expressly makes the right cognizable on collateral review. In that case, a prisoner has one year to present a claim invoking the new right. 28 U.S.C. § 2244(d)(1)(C).

Third, under § 2244(d)(1)(D) the statutory language specifically allows for potential claim-specific tolling in a situation where the prisoner is late in discovering the "factual predicate" of an individual claim. Even in that case, however, the statute dictates that the claim may only be considered if the prisoner files within one year of the date upon which he knew or should have known of that factual predicate. 28 U.S.C. § 2244(d)(1)(D).

These detailed and case-specific extensions show that Congress enacted AEDPA after fully considering and balancing equitable factors. Congress determined not only the default limitations period, but also which potential causes for delayed

filing beyond that period should or should not be counted against the prisoner, and the length of a reasonable delay. In doing so, Congress built into AEDPA all of the equitable tolling it intended.

Another indication that judicially-created equitable tolling is contrary to the intent of Congress is the language contained in another AEDPA provision. After considering allowing the application of judicial tolling, Congress determined that an additional, but very narrow, window should be allowed only in the context of expedited capital habeas proceedings, where 28 U.S.C. § 2263(a) proscribes a 180-day limitations period for seeking habeas relief, commencing on the date of state court finality. In that context, Congress permitted federal courts to grant equitable tolling for up to 30 days, if "a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section." 28 U.S.C. § 2263(b)(3)(B). Considering the intentional inclusion of an equitable tolling provision by Congress in this circumstance, it is unlikely that Congress intended additional equitable tolling beyond that which is specifically allowed by AEDPA.

This conclusion is supported by the statutory construction maxim, "expressio unius est exclusio alterius"—the presumption that "the expression of one is the exclusion of others." *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988). Application of this maxim has the effect that other unidentified conditions or events cannot be considered to have the same effect—tolling—in the given situation. Of course, the presumption cannot be applied where it would be contrary to or inconsistent with

congressional intent. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991). But here, because the intent of Congress was to enact a limitations period which strictly limited habeas review, refusal to allow additional, unstated "equitable" tolling by courts is completely consistent with the congressional intent of AEDPA.

The fact that the circuit courts of appeal agree that § 2244(d)(1) is subject to equitable tolling does not make that conclusion correct. The conclusion that § 2244(d)(1) is subject to tolling because it is labeled a statute of limitations, rather than a jurisdiction statute, is not the correct analysis. This Court should grant review to apply the correct analysis to the question.

3. If Equitable Tolling Applies To § 2244(d)(1), Harris' Tactical Decision Does Not Constitute Extraordinary Circumstances

If § 2244(d)(1) is subject to equitable tolling, Harris' failure to comply with the one-year limitation period was not the result of extraordinary circumstances that justify tolling. The fact that the Ninth Circuit reached a contrary conclusion demonstrates the importance of the Court providing guidance on the criteria for equitable tolling. In *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), the Court explained that to receive the benefit of equitable tolling, an inmate "must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." (Internal quotation marks omitted.) However, beyond explaining why

the facts in *Lawrence* did not constitute extraordinary circumstances, the Court did not explain the concept in any detail.

In this case, the Ninth Circuit recites the *Lawrence* criteria. App. 7a. However, the Ninth Circuit did not actually review the facts to determine if Harris' failure to file was the result of extraordinary circumstances.

The State argued that "Harris should be held responsible for the consequences of his own litigation choices, and should not be rescued from having made a poor tactical decision." App. 8a (internal quotation marks omitted). Instead of analyzing the limited nature of extraordinary circumstances, the Ninth Circuit focuses on general principles of equity. According to the court, the "State's argument ignores [that] the rationale behind the principle of equitable tolling . . . is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." App. 8a (internal quotation marks omitted). The Ninth Circuit went on to explain that "[e]quitable tolling also serves to prevent the unjust technical forfeiture of causes of action." App. 8a–9a (internal quotation marks omitted).

The Ninth Circuit stated that "[e]quitable tolling is typically granted when litigants are unable to file timely petitions as a result of external circumstances beyond their direct control." App. 9a. According to the court, the reason that timely filing was beyond Harris' control is that he "was undoubtedly aware of when AEDPA's statute of limitations would expire under our rule in

Dictado." App. 9a. Thus, he "presumably chose his tactical strategy precisely *because* he believed that, under *Dictado*, he could pursue relief in state courts without jeopardizing his ability to file a federal habeas petition." App. 9a. For the Ninth Circuit, "[t]he critical fact here is that Harris relied in good faith on then-binding circuit precedent in making his tactical decision to delay filing a federal habeas petition." App. 9a.

The problem with the Ninth Circuit's analysis is that it does not completely describe the legal landscape. We have no doubt that Harris was aware of the Ninth Circuit decision in *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001). However, he also presumably was aware that *Dictado* resolved a question left open by this Court in *Artuz v. Bennett*, 531 U.S. 4, 8 n.2 (2000) ("We express no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed.").

Harris also presumably was aware that other circuits had rejected the conclusion reached by the Ninth Circuit in *Dictado*. *Brooks v. Walls*, 279 F.3d 518, 524 (7th Cir. 2002) ("To the extent that *Dictado* holds that any merits-related exceptions to state timeliness rules make all state collateral attacks timely (and thus 'properly filed') it is incompatible with the law established by the Supreme Court . . . and by this circuit[.]"); *Merritt v. Blaine*, 326 F.3d 157, 165 (3d Cir. 2003) ("We need not decide whether we would find the Ninth Circuit's analysis [in *Dictado*] persuasive because we are bound by our prior holding in *Fahy*. We held in *Fahy* that an untimely PCRA petition does not toll the statute of

limitations for a federal habeas corpus petition. 240 F.3d at 244. Although the petitioner in *Fahy* did not assert any of the PCRA's statutory exceptions to its timeliness rule, such as the newly discovered evidence exception, we do not find that distinction dispositive.").

Brooks and *Merritt* were both decided before February 4, 2004, when the Washington Supreme Court issued its order terminating Harris' first personal restraint petition. At that time, Harris could have filed a timely federal habeas corpus petition instead of his second personal restraint petition.

In light of the entire legal background, it is not extraordinary that this Court would resolve a conflict in the circuits, on a question it had expressly left open, and resolve the question against one of the conflicting circuits.

Once *Brooks* and *Merritt* were decided, Harris had a tactical choice to make. On one hand, he could continue to rely on *Dictado*, on the theory that this Court would not reach the issue or would adopt the position of the Ninth Circuit. On the other hand, Harris could have filed a protective habeas corpus petition and, as the Magistrate Judge explained, "ask[ed] the federal court to stay and abbey the federal habeas proceedings until state remedies are exhausted." App. 29a–30a.

Indeed, in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), this Court indicated that filing a protective petition is the proper course of action. In *Pace*, the inmate questioned the fairness of the Court's decision that a state postconviction petition is not properly filed for purposes of tolling the statute of limitations under § 2244(d)(2), if it is ultimately

rejected by the state court. According to the inmate, a "petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never properly filed, and thus that his federal habeas petition is time barred." *Pace*, 544 U.S. at 416 (internal quotation marks omitted). According to the Court, this problem may be avoided "by filing a protective petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Id.* (internal quotation marks omitted). Harris made a tactical decision not to follow this procedure. That decision does not constitute an extraordinary circumstance.

What is important for the purpose of this petition is that the lower federal courts need guidance about what constitutes extraordinary circumstances. If § 2244(d)(1) is subject to equitable tolling, it is important that the Court provide that guidance.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

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July 14, 2008

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY L. HARRIS, *Petitioner-Appellant,* v. SANDRA CARTER, Superintendent, *Respondent-Appellee.*	No. 06-35313 D.C. No. CV-05-00885-JLR OPINION

Appeal from the United States District Court for the Western District of Washington James L. Robart, District Judge, Presiding

Argued and Submitted

January 11, 2008 – Seattle, Washington

Filed February 8, 2008

Before: Robert R. Beezer, A. Wallace Tashima, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Beezer

COUNSEL

David Zuckerman (argued), Sheryl Gordon McCloud (briefed), Seattle, Washington, for the petitioner-appellant.

Gregory J. Rosen, Olympia, Washington, Assistant Attorney General, Criminal Justice Division, for the respondent-appellee.

OPINION

BEEZER, Circuit Judge.

Jerry Harris ("Harris") appeals the district court's order dismissing Harris' 28 U.S.C. § 2254 petition for writ of habeas corpus as time-barred and concluding that Harris is not entitled to equitable tolling. Harris argues that he is entitled to equitable tolling because he relied on our precedent. We were subsequently overruled by the Supreme Court in a decision that holds that untimely state habeas corpus petitions do not toll the federal statute of limitations for filing a federal petition. Harris' federal habeas petition, which would have been timely under our existing precedent, became time-barred when the Supreme Court decided *Pace v. Diguglielmo*, 544 U.S. 408 (2005). Because we hold that Harris is entitled to equitable tolling, we reverse the judgment of the district court dismissing Harris' petition as untimely and remand to permit the district court to consider the merits of Harris' petition.

I

On October 21, 1995, Rene Vivas ("Vivas") was shot and killed outside Murdock's Restaurant and Bar in Ferndale, Washington. A Washington superior Court jury returned a guilty verdict against Harris on a charge of aggravated first degree murder for his role in Vivas' death. The trial court sentenced Harris to life in prison without parole. The Washington Court of Appeals affirmed Harris' conviction. The Supreme Court of Washington denied Harris' petition for review. Harris' conviction became final on May 29, 2000, which was 90 days after the Washington Supreme Court denied Harris' petition for review on direct appeal.[1]

Harris filed three successive personal restraint petitions ("PRP") in the Washington courts. On February 20, 2001, 267 days after his conviction became final, Harris filed his first PRP in the Washington Court of Appeals. On August 25, 2003, the Washington Court of Appeals affirmed the conviction. On December 8, 2003, the commissioner of the Supreme Court of Washington ("Commissioner") entered a ruling denying review.[2] On

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[1] A judgment becomes final for purposes of 28 U.S.C. § 2244(d) when the period for filing a petition for certiorari in the U.S. Supreme Court expires. *Shannon v. Newland*, 410 F.3d 1083, 1086 (9th Cir. 2005). Petitions for certiorari must be filed in the U.S. Supreme Court within 90 days after the supreme court of the state in which the prisoner was convicted issues its opinion or denies review. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

[2] The Commissioner is a staff member of the Supreme Court of Washington, and is appointed by the court. The Commissioner screens petitions for review to the court, and has

February 4, 2004, the Supreme Court of Washington denied Harris' petition to modify the Commissioner's ruling.

Harris filed his second PRP 29 days later, on March 4, 2004. On July 27, 2004, the Commissioner entered a ruling dismissing Harris' petition as untimely because it contained some untimely claims. On October 5, 2004, the Supreme Court of Washington denied Harris' petition to modify the Commissioner's ruling.

II

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Harris had one year from the date his conviction became final to file a habeas corpus petition in federal court. 28 U.S.C. § 2244(d)(1). AEDPA tolls the one-year limitations period while a "properly filed application" for post-conviction review is pending in state court. 28 U.S.C. § 2244(d)(2).

The U.S. Supreme Court holds that untimely state post-conviction petitions are not "properly filed" under AEDPA, and do not toll AEDPA's statute of limitations. *Pace*, 544 U.S. at 417. In Harris' case, AEDPA's statute of limitations ran continuously from February 4, 2004 until he filed his federal habeas petition over 15 months later. Harris' federal

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authority to issue rulings denying review. *See* Wash. R. App. P. 1.1(f); Wash. Sup Ct. Admin. R. 15(c). If the Commissioner denies a petition for review, the petitioner may file a motion to modify the Commissioner's ruling. In such cases, the court will examine the matter and will either grant or deny the motion to modify.

habeas petition was time-barred under the rule announced in *Pace*.

Until the Supreme Court decided *Pace* on April 27, 2005, our circuit law was different. Our precedent stated that an untimely Washington State post-conviction petition was "properly filed" for purposes of § 2244(d) and tolled the statute of limitations while the petition was pending in the state courts. *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001). Under our rule in *Dictado*, AEDPA's clock was stopped while Harris' second and third PRPs were pending. Under *Dictado*, Harris would have had 63 days after the Supreme Court of Washington's denial of his third PRP within which to file his federal habeas petition.[3]

On May 11, 2005, Harris filed his federal habeas corpus petition in the U.S. District Court for the Western District of Washington. Appellee Sandra Carter (the "State") filed a motion to dismiss arguing that Harris' federal habeas petition was time-barred under *Pace*. Harris did not contest that his petition would be time-barred under a strict application of *Pace*, but argued that he was entitled

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[3] We hold that the statue of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000) (internal quotations and citation omitted). Under the rules established in *Nino* and *Dictado*, Harris' PRPs were pending, and the statue of limitations was tolled, until the Washington Supreme Court denied Harris' petition to modify the Commissioner's ruling for each PRP.

to equitable tolling of the statue of limitations because he relied on controlling Ninth Circuit precedent in waiting to file his federal habeas petition. The magistrate judge issued a report and recommendation concluding that the petition was time-barred and that Harris was not entitled to equitable tolling. The district court adopted the report and recommendation and dismissed Harris' petition. Harris timely appeals.

III

We review de novo the denial of a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254. *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir. 2001). The facts underlying this claim for tolling of AEDPA's limitations period are undisputed. We review de novo whether the statute of limitations should be tolled. *Espinoza-Matthews v. California*, 432 F.3d 1021, 1025 (9th Cir. 2005).

IV

The sole question presented is whether we should strictly apply the Supreme court's rule announced in *Pace* on a retroactive basis, or whether we should grant equitable tolling given Harris' reliance on our controlling precedent in *Dictado*. We hold that equitable tolling should be granted under these circumstances.

A

The parties first dispute which standard we should apply to determine whether equitable tolling

is justified in habeas cases such as this one.[4] The State refers to our observation that equitable tolling is available only when "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time."[5] *See, e.g., Stillman v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003). Harris argues that the Supreme Court articulated a new and less strict standard in *Pace*. In *Pace*, the Supreme Court says that a habeas petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance has stood in his way." *Pace*, 544 U.S. at 418; *see also Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007).

Our cases since *Pace* have not settled on a consistent standard. *Compare, e.g., Raspberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006) (citing *Pace* and applying its standard), *with Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) (applying the standard articulated in *Stillman*). Our only case to address the issue noted the possibility that *Pace*

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[4] Although the Supreme Court has never explicitly decided whether § 2244(d) allows for equitable tolling, *see Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), we hold that it does, *see, e.g., Espinoza-Matthews*, 432 F.3d at 1026.

[5] Despite the unequivocal "impossibility" language in our standard, we have not insisted that it be literally impossible for a petitioner to file a federal habeas petition on time as a condition of granting equitable tolling. We have granted equitable tolling in circumstances where it would have technically been possible for a prisoner to file a petition, but a prisoner would have likely been unable to do so. *See, e.g., Mendoza v. Carey*, 449 F.3d 1065, 1069-71 (9th Cir. 2006) (holding that Spanish-speaking petitioner who did not have access to Spanish language legal materials alleged facts that, if true, could entitle him to equitable tolling).

"lowered the bar somewhat" compared with our previous standard. *See Espinoza-Matthews*, 432 F.3d at 1026 n.5. The case does not decide whether a substantive difference exists between the two standards. *See id.*

We need not decide whether the *Pace* standard differs from our previous standard because, as discussed below, the arguable distinctions between the two standards are not at issue in this case.

B

The State argues that Harris does not meet our standard for equitable tolling set forth above. The State says that Harris failed to file diligently his federal habeas petition in a manner that ensured it would be timely. Harris made a deliberate, tactical choice, the State argues, in waiting to file his federal habeas petition and pursuing post-conviction relief in the state courts. Nothing beyond Harris' own tactical decision, the State further argues, prevented Harris from filing a timely federal habeas petition. The State urges that Harris should be held responsible for the consequences of his own litigation choices, and should not be "rescue[d]" from having made a poor tactical decision.

The State's argument ignores the rationale behind the principle of equitable tolling that formed the basis for the standards articulated in *Pace* and *Stillman*. We have stated that the purpose of the equitable tolling doctrine "is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir. 2004). Equitable tolling also serves to "prevent the

unjust technical forfeiture of causes of action." *Id.* Equitable tolling is typically granted when litigants are unable to file timely petitions as a result of external circumstances beyond their direct control. *See Stillman*, 319 F.3d at 1202. Equitable tolling is typically denied in cases where a litigant's own mistake clearly contributed to his predicament. *See Lawrence*, 127 S. Ct. at 1085.

The fact that Harris *could* have filed a timely federal habeas petition at a certain point in time is not dispositive. The critical fact here is that Harris relied in good faith on then-binding circuit precedent in making his tactical decision to delay filing a federal habeas petition. Harris' failure to file a timely petition is not the result of oversight, miscalculation or negligence on his part, all of which would preclude the application of equitable tolling. *See Lawrence*, 127 S. Ct. at 1085. Harris was undoubtedly aware of when AEDPA's statute of limitations would expire under our rule in *Dictado*. Harris presumably chose his tactical strategy precisely *because* he believed that, under *Dictado*, he could pursue relief in state courts without jeopardizing his ability to file a federal habeas petition.

Harris' circumstances justify equitable tolling under both our circuit's standard and the *Pace* standard. Harris diligently pursued his rights. He filed successive petitions for state post-conviction relief while ensuring that enough time would remain to file a federal habeas petition under the then-existing *Dictado* rule. The Supreme Court's overruling of the *Dictado* rule made it impossible for Harris to file a timely petition. Harris' petition

became time-barred the moment that *Pace* was decided. Finally, Harris had no control over the operative fact that caused his petition to become untimely—the Supreme Court's decision in *Pace*. These are precisely the circumstances in which equitable principles justify tolling of the statute of limitations.

C

Harris argues that Supreme Court case law counsels in favor of granting equitable tolling in this case. In *Pliler v. Ford*, 542 U.S. 225 (2004), the Supreme Court reversed our holding that district courts were required to provide habeas petitioners with a specific warning that their case could become time-barred. *Id.* at 231. The Supreme Court remanded the case to us for consideration of equitable tolling given our "concern that respondent had been affirmatively misled" by the district court. *Id.* at 234. The unstated implication in the Supreme Court's opinion is that equitable tolling would likely be appropriate in at least some situations where a petitioner is affirmatively misled by a district court. *See id.; see also id.* at 235 (O'Connor, J., concurring) ("Nevertheless, if the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate."); *Brambles v. Duncan*, 412 F.3d 1066, 1070 (9th Cir. 2005) ("Consistent with the Court's decision in *Pliler*, the sole issue before us is whether [petitioner] was affirmatively misled by the district court's instructions.").

Pliler does not compel us to grant equitable tolling in this case. The Supreme Court's decision to

remand for consideration of equitable tolling nonetheless supports our conclusion that equitable relief is justified under these circumstances. In *Pliler*, the Supreme Court remanded because of the possibility that a petitioner relied upon, and was misled by, a district court's representations. Harris' request for equitable tolling arises from his reliance on our holding that was subsequently declared to be legally erroneous. Our holding misled Harris into believing that he had ample time to file his federal habeas petition, whereas in reality time was running out. Although Harris was misled by reliance on our precedent rather than by a statement of the court addressed directly to him, the consequences were the same. Harris' petition became time-barred.

D

Harris argues that authority from other federal courts support his request for equitable tolling. We agree. The Tenth Circuit has granted equitable tolling on facts similar to those here. *See York v. Galetka*, 314 F.3d 522 (10th Cir. 2003). In *York*, the district court had previously dismissed the petitioner's second federal habeas petition for failure to exhaust all claims. *Id.* at 526. The petitioner did not immediately file a third federal petition raising only the exhausted claims. *Id.* Instead, petitioner waited several months, attempting to exhaust his remaining state claims before filing another federal habeas petition. *Id.* At the time, the law was unclear whether the pendency of a federal habeas petition tolled AEDPA's limitations period. *See id.* at 528. Petitioner's third federal petition would be timely only if the law was resolved in his favor.

After petitioner filed his third habeas petition, the Tenth Circuit resolved the law in petitioner's favor. The Tenth Circuit held that a pending federal habeas petition did toll the statute of limitations. *Id.*; *see Petrick v. Martin*, 236 F.3d 624, 629 (10th Cir. 2001). The Supreme Court overruled the Tenth Circuit in *Duncan v. Walker*, 533 U.S. 167 (2001). As a result, petitioner's third federal habeas petition became untimely.

The Tenth Circuit held that petitioner was entitled to equitable tolling.[6] The Tenth circuit held that equitable tolling was justified because "York diligently pursued his claims[,] . . . the law in this circuit was unsettled on the issue [whether a pending federal habeas petition tolled the statute of limitations] and the statue is ambiguous." *Id.* at 528.[7]

Like the petitioner in *York*, Harris diligently pursued his habeas claims. In *York*, as here, the petitioner's habeas petition became untimely only after the Supreme Court later altered the law. The facts here present an even more compelling argument for equitable tolling than those in *York*. Harris relied on controlling circuit precedent, rather than an ambiguity in the law, in making his strategic

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[6] The Tenth Circuit employed a "rare and exceptional circumstances" standard similar to the standards articulated in *Pace* and *Stillman* in determining that equitable tolling was justified. *York*, 314 F.3d at 527.

[7] We also recognize that a district court has granted equitable tolling to a petitioner on facts substantively identical to those here. *See De Jesus v. Miller*, 215 F. Supp. 2d 410, 412-13 (S.D.N.Y. 2002).

decision to delay his federal petition while pursuing relief in the state courts. The Supreme Court's subsequent overruling of our controlling precedent constitutes the type of extraordinary circumstances that justifies a grant of equitable tolling.[8]

V

Equitable principles dictate that we toll AEDPA's statute of limitations in the rare case where a petitioner relies on our legally erroneous holding in determining when to file a federal habeas petition. We told that Harris is entitled to equitable tolling of AEDPA's one-year statute of limitations. Consequently, Harris' federal habeas petition is timely. We reverse the judgment of the district court dismissing Harris' petition as untimely and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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[8] We do not decide the question specifically answered by the Tenth Circuit in *York* –whether equitable tolling should be granted when a petitioner waits to file a habeas petition despite an ambiguity in the law, and the ambiguity is later resolved by a court in a manner that results in the petition being untimely. The argument for equitable tolling in the situation encountered in *York* would be less persuasive than the argument for equitable tolling that Harris presents here.

FILED
MAR 14, 2008

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY L. HARRIS, Petitioner-Appellant, v. SANDRA CARTER, Superintendent, Respondent-Appellee.	No. 06-35313 D.C. No. CV-05-00885-JLR Western District of Washington, Seattle ORDER

Before: BEEZER, TASHIMA, and TALLMAN, Circuit Judges.

Judge Tallman votes to deny the petition for rehearing en banc and Judges Beezer and Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERRY L. HARRIS, Petitioner, v. SANDRA CARTER, Respondent.	CASE NO. C05-885-JLR ORDER

The Court, having reviewed the Petition for Writ of Habeas Corpus, Respondent's Motion to Dismiss, the Report and Recommendation of the Honorable Monica J. Benton, United States Magistrate Judge, and the remaining record, finds and Orders as follows:

(1) The Court adopts the Report and Recommendation;

(2) Respondent's motion to dismiss (Dkt. #9) is GRANTED, the Petition for Writ Habeas Corpus (Dkt. #1) is DENIED, and this matter is DISMISSED with prejudice;

(3) The Clerk if directed to send copies of this Order to counsel for each party, and to the Honorable Monica J. Benton.

DATED this 20th day of March, 2006.

s/James L. Robart

JAMES L. ROBART

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERRY L. HARRIS, Petitioner, v. SANDRA CARTER, Respondent.	JUDGMENT IN A CIVIL CASE CASE NO. C05-885-JLR

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Report and Recommendation is adopted. The Petitioner's habeas corpus petition is DISMISSED with prejudice.

Dated this 20th day of March, 2006

BRUCE RIFKIN
Clerk

s/Mary Duett
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERRY L. HARRIS, Petitioner, v. SANDRA CARTER, Respondent.	CASE No. C05-885-JLR-MJB RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Jerry L. Harris is a state prisoner currently incarcerated at the Clallam Bay Corrections Center in Clallam Bay, Washington. He seeks relief under 28 U.S.C. § 2254 from the judgment and sentence resulting from his October 1996 conviction in Whatcom County Superior Court for aggravated first degree murder. In lieu of filing an answer, respondent filed a motion to dismiss on grounds that petitioner's federal habeas petition is time-barred under 28 U.S.C. § 2244(d)(1)(D). Dkt. #9. Petitioner filed a response in opposition to the motion (Dkt. # 12), and respondent filed a reply (Dkt. #13). After careful consideration of the entire record, I conclude that respondent's motion to dismiss should be GRANTED.

II. FACTUAL AND PROCEDURAL HISTORY

The Washington Court of Appeals summarized the facts of related to petitioner's conviction as follows:

> On October 21, 1995, Rene Vivas was shot and killed outside Murdock's Restaurant and Lounge in Ferndale, Washington. Todd Mihalcea, Murdock's bouncer, broke up a fight that night involving defendant Brett Johnston. Later that evening, he stopped another fight in Murdock's parking lot where several people were beating Johnston. Mihalcea took Johnston back to his associates, defendants Jerry Harris and Michael Sawyer. The three men persuaded Mihalcea not to call the police. When Mihalcea discovered the credit card the defendants presented was expired, they agreed to go to a cash machine to pay their tab. Mihalcea recorded the license plate number of Johnston's El Camino.
>
> Kim Smith was a patron at Murdock's that evening and sat with Vivas and a group of other people, including defendant Harris. Smith noticed that Vivas had a large amount of money and wore an apparently-valuable necklace. She also noticed that Harris was watching Vivas and whenever Harris noticed Smith looking at him, he looked away. Smith had "one of those funny feelings" about Harris and asked her companions if they knew who he was. No one did.
>
> At closing time, Harris left Murdock's and walked around the corner out of Mihalcea's view. Soon afterwards, Vivas left

Murdock's and followed Harris's route. Mihalcea heard a gunshot a short time later. Robbie Berg, a member of the band that had been playing at Murdock's also heard the gunshot. He went around the corner and saw two men standing over Vivas' prone body. One of the men pointed a gun at Berg and told him to leave. Berg ran and called 911. Mihalcea ran around the corner, saw Vivas lying on the ground and heard people running away.

Two Ferndale Police Officers were parked across the street from Murdock's at the time of the shooting. They heard the shot, and shortly afterwards were dispatched to Murdock's. After speaking with Mihalcea, they broadcast the El Camino's license plate number. Washington State Patrol Trooper Dan W. Turner heard the broadcast. He was following Johnston's El Camino because he suspected Johnston was driving under the influence of alcohol. Trooper Turner stopped the El Camino and saw defendant Harris and Sawyer in the passenger seats. Back up officers arrived a short time later and confirmed that Mihalcea's descriptions of the three men at Murdock's matched the men in the El Camino.

After a few hours, the defendants were taken for a gunshot residue test. No residue was found on any of their hands, but some of the officers saw "blood on the lower part of Mr. Harris' right leg." Harris also had blood on his socks, shirt, and coat. Between 6 a.m. and 7 a.m., officers seized all three defendants'

clothing without a warrant. The clothing had been inventoried and was in the custody of the jail. At noon the same day, police served search warrants for hairs and fibers on the three defendants. Analysis at a forensic laboratory established that DNA from blood found on Harris' pants matched Vivas' DNA profile.

Later that afternoon, Detective Bob Watson and Russell Robinson interviewed Sawyer in the Whatcom County Jail after Sawyer waived his *Miranda* rights. Based on the information Sawyer gave them, the detectives found Vivas' necklace and wallet in the dashboard of the El Camino,[1] a gun Harris threw out of the window, and a second spent shell casing. Forensic analysis of the gun established that it ejected the spent shell casings found near Vivas' body and in the El Camino.

The defendants were charged with aggravated first degree murder and first degree felony murder. Harris moved pretrial and during trial to sever his case from the codefendants. He also moved to admit certain "confessions" Sawyer made during his months in custody before trial that allegedly exonerated Harris. After a hearing, the trial court denied all the motions.

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[1] Detective Watson had searched the El Camino earlier and, although he found Mr. Vivas' necklace in the car, he could not find the wallet, which was stuffed into the front console.

Harris tried to offer details of a robbery at the Evergreen Motel in Bellingham four days before Vivas was murdered. During the robbery, Sawyer threatened Steve Whitten with a gun, then pistol-whipped him. The gun discharged and grazed Whitten's head. Harris held Whitten's wife to keep her from helping Whitten. Harris also kicked Whitten and yelled at him to give Sawyer the money they wanted. Sawyer and Harris were convicted of the robbery in July 1996. The trial court denied the motion to admit details of the Evergreen robbery as irrelevant and prejudicial.

During trial, Sawyer's counsel asked Detective Watson if he knew that Sawyer was not a "gun person." Harris again moved to present evidence of the Evergreen Robbery to rebut the interference that Sawyer did not handle guns. The trial court denied the motion, struck the question and answer, and instructed the jury to disregard them.

Harris was convicted of aggravated first degree murder. The parties later realized that many of the jury instructions used by the jury during their deliberations included citations to authority.

Dkt. #9 at Ex. 7 Unpublished Opinion, *State v. Sawyer*, 1999 WL 619071 (Wash. App. Div. I).[2] On

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[2] When citing exhibits, this court uses the exhibit numbers that respondent assigned to the attachments to her motion to dismiss, not the exhibit numbers reflected on the court's docket for this case.

November 1, 1996, petitioner was sentenced to life imprisonment without parole or early release. *Id.* at Ex. 1, Judgment and Sentence.

Petitioner timely appealed his conviction to the Washington Court of Appeals, Div. I ("court of appeals"), raising a number of issues. *Id.* at Ex. 3. The court of appeals affirmed his conviction in an unpublished opinion issued on August 16, 1999. *Id.* at Ex. 7. Petitioner sough discretionary review in the Washington State Supreme Court ("state supreme court"), which denied the petition for review without comment on February 29, 2000. *Id.* at Ex. 9.

On February 20, 2001, Petitioner filed a Personal Restraint Petition ("PRP") in the court of appeals. *Id.* at Ex. 10. On August 25, 2003, the court of appeals issued an unpublished opinion affirming petitioner's conviction. *Id.* at Ex. #18. Petitioner's motion for discretionary review in the state supreme court was denied by the Court Commissioner. *Id.* at Ex. 21. On February 4, 2004, the state supreme court denied petitioner's motion to modify the commissioner's ruling. *Id.* at Ex. 23. Petitioner then filed a motion for hearing of the motion to modify by the full court *en banc*, or alternatively, for reconsideration of denial of the motion to modify. *Id.* at Ex. 24. However, the court clerk placed the pleading in the closed file pursuant to RAP 17.2(a) and RAP 12.4(a). *Id.* at Ex. 25.[3]

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[3] Exhibit 25 is a letter from Petitioner's counsel to the Supreme Court Deputy Clerk concerning the court's decision to place petitioner's motion to modify in the closed file. A handwritten note on the face of the letter, which appears to be initialed by the supreme court clerk, states that "at the

In March 4, 2004, petitioner filed a second personal restraint petition in the state supreme court, arguing that the validity of his conviction and sentence was affected by recent appellate decisions. *Id.* at Ex. 26. Petitioner subsequently filed an amended PRP on March 23, 2004. On July 27, 2004, the state supreme court commissioner issued a ruling dismissing the PRP because it was not based solely on grounds for relief exempt from the one year time limit for collateral attack. *Id.* at Ex. 30. On October 5, 2004, the state supreme court denied petitioner's motion to modify the commissioner's ruling. *Id.* at Ex. 32. The court issued a Certificate of Finality on July 27, 2004. *Id.* at Ex. 33.

Petitioner filed a third PRP in the state supreme court on October 11, 2004. *Id.* at Ex. 34. On March 14, 2005, the commissioner of the state supreme court issued a ruling dismissing the PRP on the basis that it was procedurally barred. *Id.* at Ex. 36. Petitioner's motion to modify the commissioner's ruling was denied by the court, without comment. *Id.* at Ex. 38. On June 8, 2005, the state supreme court issued a Certificate of Finality certifying that the commissioner's ruling on March 14, 2005 was final. *Id.* at Ex. 39.

Petitioner filed the present petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on May 11, 2005.

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direction of the Chief Justice, this letter has been placed in the closed file without further action."

III. GROUNDS FOR REVIEW

Petitioner raises the following six grounds in his federal habeas petition:

1. Whether admission of those portions of the out-of-court declaration of nontestifying codefendant Sawyer which minimized his own involvement and inculpated Mr. Harris violated the Confrontation Clause of the U.S. Constitutions [sic], especially in light of *Crawford*, *Lilly*, *Bruton*, *Richardson*, and *Gray*.

2. Whether improper redaction of the codefendant's statement to allow admission of material inculpatory of Mr. Harris but to exclude material that was exculpatory violated the constitutional rights to due process and a fair trial, and to present a complete defense.

3. Whether the trial court erred in instructing the jury that it could attribute aggravating factors to Mr. Harris, even if they were committed by one of the codefendants, in violation of the plain language of the accomplice liability statute and the aggravated murder statute, thus violating the constitutional guaranties of due process, a fair trial, and to be free of cruel and/or unusual punishment.

4. Whether the codefendant's lawyer's closing argument comment on Mr. Harris' right to remain silent violates the Constitutional guaranty of due process, a fair trial, and the right to remain silent.

5. Whether the trial court erred in failing to give the jury an explanatory or cautionary

instruction when it dismissed the aggravated murder first degree charge against codefendant Mr. Johnston, but did not dismiss the aggravated murder charge against Mr. Harris; whether such error violates the constitutional guaranty of due process and a fair trial; and whether trial counsel was ineffective in failing to request such an instruction.

6. Whether the number and severity of the errors in this case, considered in combination, amounts to cumulative error in violation of the due process and fair trial guaranties of the U.S. Constitution.

IV. DISCUSSION

Respondent argues that petitioner's federal habeas petition is time-barred based on 28 U.S.C. § 2244(d) and *Pace v. DiGuglielmo*, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations on habeas corpus petitions filed by state prisoners in federal court. 28 U.S.C. § 2244(d)(1). It specifically provides that "he limitation period shall run from the latest of -- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

Thus, under the statute, a judgment becomes "final" in one of two ways -- either by the conclusion of direct review by the highest court, including the United States Supreme Court, to review the judgment, or by expiration of the time to seek such review, again from the highest court from which such

direct review can be sought. *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001); *cf. Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999) ("We hold that the period of direct review includes the period within which a petitioner can file a petition for writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition.").

On direct review, the state supreme court denied petitioner's petition for discretionary review on February 29, 2000. Dkt. #9 at Ex. 9. Petitioner then had 90 days after entry of the order to file a petition for writ of certiorari in the United States Supreme Court. Sup. Ct. R. 13(1). Accordingly, because petitioner could have sought a writ of certiorari during that period, his state court judgment became final and the limitations period began to run on May 29, 2000, the date on which time to seek such review expired. Thus, counting forward one year, Petitioner had until May 29, 2001, to file his federal habeas petition, unless the statute of limitations was statutorily or equitably tolled.

Here, Petitioner's federal habeas petition was filed on May 11, 2005, almost four years outside the limitations period. Accordingly, his federal habeas petition is timely only if his state court PRPs tolled AEDPA's statute of limitations for all but 365 days or less between the date on which the limitations period began to run and the filing of his federal habeas petition.

A. *Statutory Tolling*

The AEDPA provides that the one-year statute of limitations is tolled for "[t]he time during which a

properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). An application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings, including the time limits upon its delivery. *See Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000). When a postconviction petition is untimely under state law, "that [is] the end of the matter" for purposes of § 2244(d)(2). *Pace v. DeGuglielmo*, 125 S.Ct. at 1812.

In this case, it is undisputed that Petitioner's first PRP tolled the statute of limitations because it was filed on February 20, 2001, slightly more than three months before his one-year limitations period for filing a federal habeas petition expired. *See* Dkt. #9 at Ex. 10. The limitations period remained tolled until February 4, 2004, the date the state supreme court denied petitioner's motion to modify the court commissioner's ruling denying petitioner's motion for discretionary review. *See* Dkt. # 9 at Ex. 23. Likewise, petitioner does not challenge respondent's argument that under *Pace*, neither of petitioner's last two PRPs were "properly filed" because the state supreme court commissioner ruled that they were untimely. Thus, under *Pace v. DiGuglielmo*, neither of the last two PRPs operated to further toll the one-year limitations period under § 2244(d)(2). Petitioner contends, however, that he is entitled to equitable tolling.

B. *Equitable Tolling*

"[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (citation omitted). The Ninth Circuit has made it clear that "[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control makes it impossible to file a petition on time." *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc) (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1997)); *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997). When external forces, rather than a lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate. *See Miles v.* Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); Calderon *(Kelly)*, 163 F.3d at 541; *Calderon (Beeler)*, 128 F.3d at 1288-89. The petitioner bears the burden of proving that he is entitled to equitable tolling. *See Smith v. Duncan*, 297 F.3d 809, 814 (95 Cir. 2002); *see also Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir. 1993).

Here, Petitioner asserts that he "sought state appellate and post-conviction relief early and continuously, without letting any periods of time elapse while sleeping on his rights." Dkt. #12 at 4. He argues that he is entitled to equitable tolling because he justifiably relied on the pre-*Pace* controlling precedent in the Ninth Circuit, *Dictado v. DuCharme*, 244 F.3d 724 (9th Cir. 2001), where the court ruled that state post-conviction petitions which

the state courts determine to be "untimely" may nevertheless be considered "properly filed" under § 2244(d)(2). *Id.* at 2, 6. Respondent opposes application of equitable tolling in this case on the grounds that such circumstances fail to meet the high burden for equitable tolling established by the Ninth Circuit. Respondent notes that with the U.S. Supreme Court's holding in *Pace*, the precedent set out in *Dictado* no longer applies. Respondent argues that "the responsibility for the untimely filing of petitioner's federal habeas petition lies with his decision to file three personal restraint petitions in the Washington state courts (with the last two of those petitions being found time-barred) rather than filing a federal habeas petition." Dkt. #13 at 2.

This court agrees that Petitioner has not met his burden of proving entitlement to equitable tolling. Petitioner has simply not identified any extraordinary circumstances "beyond his control" that made it *impossible* for him to file a timely federal habeas petition. The fact that *Dictado* was controlling Ninth Circuit law *pre-Pace*, in no way precluded or made it "impossible" for petitioner to seek federal habeas relief. Petitioner was free to file his federal habeas petition at any time after his state court judgment became final, and the decision to delay pursuing federal remedies was not beyond petitioner's or his counsel's control. In fact, a prisoner seeking state postconviction relief might avoid the predicament of finding out at the end of years of state court litigation in a good faith effort to exhaust state remedies that he was never "properly filed," by filing a "protective petition" in federal court and asking the federal court to stay and abbey the

federal habeas proceedings until state remedies are exhausted. *See Pace v. DiGuglielmo*, 125 S.Ct. at 1813 (citing *Rhines v. Weber*, -- U.S. --, 125 S.Ct. 1528, 1531, 161 L.Ed.2d 440 (2005)). Here, instead of an external force, it was petitioner's and his counsel's tactical choice to continue to pursue filing several PRPs in the state courts, rather than filing a federal habeas petition within AEDPA's one-year window. Therefore, I conclude that petitioner is not entitled to equitable tolling.

V. CONCLUSION

For the reasons set forth above, I recommend that Respondent's motion to dismiss (Dkt. #9) be GRANTED, thereby denying Petitioner's § 2254 habeas petition (Dkt. #1) and dismissing this action with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 31st day of January, 2006.

/s/ Monica J. Benton

MONICA J. BENTON

United States Magistrate Judge

FILED
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THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON Respondent, v. MICHAEL S. SAWYER and BRETT LEE JOHNSTON, Defendants, JERRY L. HARRIS a/k/a "TODD," Petitioner.	NO. 68595-9 **ORDER** C/A NO. 39757-5-I

Department I of the Court considered this matter at its February 29, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 29th day of February, 2000.

/s/ Richard P. Guy
CHIEF JUSTICE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

In the Matter of the Personal Restraint of: JERRY L. HARRIS, Petitioner.	NO. 48450-8-I UNPUBLISHED OPINION FILED: AUG 25 2003

AGID, J. -- Jerry Harris seeks relief from his conviction of one count of first degree murder and his sentence to life imprisonment without parole. He alleges the trial court (1) erred by admitting portions of an out-of-court declaration by his non-testifying codefendant; (2) violated his right to due process under *State v. Roberts* by instructing the jury that he could be convicted as an accomplice if he were seeking to promote "a" crime rather than "the" crime charged; (3) violated his right to due process by instructing the jury that it could attribute aggravating factors to him even if they were committed by his codefendants; (4) violated his rights to due process, a fair trial, and to remain silent by permitting a codefendant's lawyer to improperly comment on Harris' exercise of his right to remain silent; and (5) violated due process by failing to give a cautionary instruction when it dismissed a charge against Harris' codefendant. Harris also claims his lawyer was ineffective for failing to request a curative instruction, the trial court violated his right to due process by failing to insure jury unanimity on each of the aggravating factors, and finally, the number and severity of the errors denied him a fair trial. We reject these arguments and affirm.

FACTS

On October 20, 1995, Jerry Harris went to Murdock's Restaurant and Bar. Brett Johnston arrived later in the evening and joined him. At 10:30 that evening, Todd Mihalcea, the doorman at Murdock's, escorted Johnston and another man out of the bar when he saw them "exchanging words." Soon after, Mihalcea saw a large group of men, whom he had expelled from the bar earlier because they were too drunk to serve, beating Johnston in the parking lot. Mihalcea stopped the fight and brought Johnston inside the bar to clean him up. Later that evening, Harris attempted to pay his bill with a credit card, but the card was declined. Harris left the bar, promising Mihalcea that he would return with the money he owed for his drinks. Later, Mihalcea noticed Harris, Johnston, and Sawyer sitting in an El Camino in the parking lot. When he demanded payment from them, Johnston wrote him a check for the bill. Mihalcea then wrote down the license plate number of Johnston's El Camino.

At closing time, Harris reentered Murdock's and Mihalcea returned this credit card. When Harris left the bar, he walked around the corner out of Mihalcea's view. Soon afterwards, patrol Rene Vivas left Murdock's and followed Harris' route. Mihalcea heard a gunshot a short time later. Robbie Berg, a member of the band that had been playing at Murdock's, also heard the gunshot. Berg went around the corner and saw two men standing there, lowering Vivas to the ground. Vivas had blood on his face. One of the men pointed a gun at Berg and told him to leave. Berg ran and called 911. Mihalcea ran around the corner, saw Vivas lying on the ground,

and heard people running away. Two Ferndale Police Officers were parked across the street from Murdock's at the time of the shooting. They heard the shot and shortly afterwards were dispatched to Murdock's. They discovered Vivas' body and a crowd of onlookers. Vivas was pronounced dead at the scene from a gunshot wound to the face. After speaking with Mihalcea, the officers broadcast the El Camino's license plate number.

Washington State Patrol Trooper Dan Turner heard the broadcast. He was following Johnston's El Camino because he suspected Johnston was driving under the influence of alcohol. Trooper Turner stopped the El Camino and saw Harris and Sawyer in the passenger seats. Back up officers arrived a short time later and confirmed that Mihalcea's descriptions of the three men at Murdock's matched the men in the El Camino. The officers handcuffed them and placed them into separate patrol cars.

At the police station, the defendants were tested for gunshot residue, but no residue was found on any of their hands. The officers seized all three defendants' clothing. Harris had blood on his socks, shirt, coat, and on his pant leg. Forensic tests confirmed the blood on Harris' pant leg was consistent with Vivas' blood type. Later that afternoon, Sawyer waived his Miranda rights, and Detective Bob Watson and Russell Robinson interviewed him in the Whatcom County Jail. Based on the information Sawyer gave them, the detectives found Vivas' necklace and wallet hidden in the El Camino, a gun Harris threw out of the car window, and a second spent shell casing. Forensic analysis of

the gun established that it ejected the spent shell casings found near Vivas' body and in the El Camino.

Harris and his codefendants were charged with aggravated first degree murder and first degree felony murder. Harris, Johnston, and Sawyer were codefendants in a joint trial. The jury found Harris guilty of aggravated murder in the first degree, Sawyer guilty of first degree felony murder, and the State dismissed the charges against Johnston. Harris was sentenced to life in prison. He filed a timely appeal, raising a number of issues, including failure to sever the codefendants. This court affirmed his conviction.[1]

ANALYSIS

A personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue.[2] But, the petitioner may raise new issues, including both errors of constitutional magnitude and nonconstitional errors that constitute a fundamental defect and inherently result in a complete miscarriage of justice.[3] To obtain relief on either constitutional or nonconstitutional claims, the petitioner must show

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[1] *State v. Sawyer*, No. 39987-0-I, 1999 WL 619075, at 9 n.46 (Wash. Ct. App. Aug. 16, 1999), *review denied*, 140 Wn.2d 1002 (2000).

[2] *In re Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986).

[3] *In re Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994).

that he was actually and substantially prejudiced by the error.[4]

I. Does the recent Washington Supreme Court decision in *State v. Roberts* demand reconsideration of an issue reviewed and rejected on direct appeal?

A reviewing court will reconsider a claim that was rejected on its merits on direct appeal if the petitioner shows that reconsideration will serve the ends of justice, which may occur when there has been an intervening change in law.[5] Harris argues that although the admissibility of his codefendant's jailhouse confession was reviewed on direct appeal, the Washington Supreme Court's opinion in *State v. Roberts*[6] was a significant change in law that requires this court to reexamine the issue. We affirmed the trial court on direct appeal based upon *Bruton v. United States*[7] and its progeny. The State argues *Bruton* remained unchanged by the Supreme Court decision in *Williamson v. United States*[8] and our Supreme Court's decision in *Roberts* adopting its reasoning. It asserts he therefore cannot challenge the statements again in his personal restraint petition. We agree.

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[4] *In re Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990).

[5] *In re Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992).

[6] 142 Wn.2d 471, 510, 14 P.3d 713 (2000).

[7] 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

[8] 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994) (adopting the "line by line" approach to narratives containing statements against interest admissible under ER 804(b)(3)).

In his direct appeal, we reviewed Harris' codefendants' redacted statement and concluded its admission did not violate Harris' constitutional confrontation rights under *Bruton*, *Richardson v. Marsh*,[9] and *Gray v. Maryland*[10] and therefore did not require severance of their trials. In *Bruton*, the United States Supreme Court held that admission under ER 8014(d)(2) of a codefendant's confession that implicated the defendant was prejudicial error in a joint trial despite the court's instructions that the jury could only use the confession against the codefendant. It held if defendant A's out-of-court statement is "powerfully incriminating" as to defendant B, the statement, if not redacted, is inadmissible in the joint trial of A and B.[11] Based on *Bruton*, *Richardson* and *Gray*, this court concluded that the statements, as redacted by the trial court, did not contain any "powerfully incriminating" references to Harris. Instead, they incriminated him only after they were linked to other evidence at trial.

The Washington Supreme Court's opinion in *Roberts*, in which it adopted the *Williamson v. United States* "line-by-line" approach to analyzing self-serving statements of a codefendant, does not

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[9] 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).

[10] 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). In *Gray*, the Supreme Court held that to protect a defendant's confrontation rights in a joined trial, the State is required to redact references that facially incriminate the defendant. A redaction is constitutionally sufficient if it contains statements that implicate a defendant only when linked with other evidence.

[11] *Bruton*, 391 U.S. at 135-36.

affect our analysis of the issue raised in Harris' initial appeal. *Williamson* and its line of cases define the scope of and limitations on statements offered as exceptions to the hearsay rule under 804(b)(3), an exception used primarily in cases where defendants are tried separately.[12] Although this line of cases is parallel to the *Bruton* line, which apply in cases where defendants are tried jointly and a codefendant's confession is admitted as non-hearsay under 801(d)(2), *Williamson* did not materially affect the law in *Bruton*.[13] Similarly, the Supreme Court's

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[12] ER 804(b)(3) provides:

> The following are not excluded by the hearsay rule if the declarantis unavailable as a witness:
>
> *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[13] ER 801(d)(2) provides:

> A statement is not hearsay if --
>
> *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope

decision to adopt the *Williamson* approach in *Roberts* does not affect this court's analysis of this issue under *Bruton* in the initial appeal. In addition, Harris provides no citation to the 3,500 page record suggesting that the State offered the evidence under 804(b)(3) at trial, nor does he explain why statements inadmissible under 804(b)(3) would also be inadmissible under the less protective terms of 801(d)(2), under which the statements were admitted at trial. We accordingly reject Harris' arguments and decline to re-examine the issue.

II. Did an accomplice liability jury instruction stating that Harris could be convicted as an accomplice if he were seeking to promote only "a" crime rather than "the" crime violate Harris' right to due process under *State v. Roberts*?

"The language of the accomplice liability statute established a mens rea requirement of 'knowledge' of 'the crime.'"[14] The statute's history, derived from the Model Penal Code, establishes that "the crime" means the charged offense. An accomplice instruction that essentially permits the jury to impose strict liability on a defendant who had general knowledge of *any* crime, not just the crime charged, improperly departs from the statute.[15]

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of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

[14] *State v. Roberts*, 142 Wn.2d 471, 510, 14 P.3d 713 (2000).

[15] *Id.* at 511.

> [A]n erroneous jury instruction may be subjected to harmless error analysis if the error does not relieve the State of its burden to prove each element of the crime charged. An erroneous instruction is harmless if, from the record in a given case, it appears beyond a reasonable doubt that the error complaint of did not contribute to the verdict obtained.[16]

Harris claims that jury instruction 25, the definition of accomplice liability, improperly allowed the jury to convict him of aggravated murder even if they believed that he only intended to commit or promote a lesser, separate crime like robbery.

Instruction 25 states as follows:

> A person who is an accomplice in the commission of *a crime* is guilty of that crime whether present at the scene or not.
>
> A person is an accomplice in the commission of *a crime* if, with knowledge that it will promote or facilitate the commission of *a crime*, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit *the crime*; or
>
> (2) aids or agrees to aid another person in planning or committing *the crime*.
>
> The word "aid" means all assistance whether given by words, acts, encouragement,

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[16] *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002).

> support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.[17]

Harris argues this instruction "essentially tells the jury that it can substitute the words 'or an accomplice' for the word 'defendant' any time it appears." Therefore, he argues, it is impossible to know which crime (robbery or murder) the jury believed that Harris intended because the instruction allows a conviction without determining that the intended the greater crime.[18] The State argues that because Harris was charged and convicted of aggravated first degree murder and the instruction for that offense did not mention accomplice liability, there was no error.

In *Roberts*, the accomplice liability jury instruction was nearly identical to the instruction in this case.[19] The court held that it departed from the

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[17] (Emphasis Added.)

[18] Harris cites *Roberts*, 142 Wn.2d at 511 (concluding that this accomplice liability instruction "allowed the jury to impose strict liability on [the defendant and] . . . improperly departed from the language of the statute").

[19] Instruction 7 in *Roberts* addressed the law of accomplice liability:

> "You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person

language of the statute and permitted the jury to impose strict liability on Roberts. In that case, the to convict instruction permitted the jury to find Roberts guilty of first degree premeditated murder, even if it found he was merely an accomplice.[20] That is not the case here.

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when he is an accomplice of such other person in the commission of *a crime*.

A person is an accomplice in the commission of a crime, whether present at the time of its commission or not, if, with knowledge that it will promote or facilitate *its commission*, he either:

(a) solicits, commands, encourages or requests another person to commit the crime; or

(b) aids another person in planning or committing the crime.

[20] Instruction 8, the to convict instruction for premeditated murder in *Roberts*, stated as follows:

To convict the defendant Michael Kelly Roberts of the crime of premeditated murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 6th day of May, 1994, the defendant *or someone to whom he was an accomplice*, stabbed Elijio V. Cantu;

(2) That Elijio V. Cantu died as a result of this stabbing;

(3) That the stabbing was done with the intent to cause the death of Elijio V. Cantu;

(4) That the intent to cause the death was premeditated; and

(5) That the acts occurred in the state of Washington.

Roberts, 142 Wn.2d at 489 (emphasis added).

Unlike the to convict instruction in *Roberts*, the to convict instruction for aggravated murder in this case stated:

> To convict the defendant, JERRY L. HARRIS, of the crime of Aggravated Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 21st day of October, 1995, the *defendant* shot Renee Vivas;
>
> (2) That the *Defendant* acted with intent to cause the death of Renee Vivas;
>
> (3) That the intent to cause the death was premeditated;
>
> (4) That Renee Vivas died as a result of the defendant's acts; and
>
> (5) That the acts occurred in the State of Washington.
>
> In addition, the State must prove one or more of the following Aggravating Circumstances beyond a reasonable doubt:
>
> (a) The murder was committed to conceal the commission of the crime or to protect or conceal the identity of any person committing the crime; or
>
> (b) The murder was committed in the course of, furtherance of, or in immediate flight from Robbery in the First Degree.

> If you find from the evidence that each of the above-mentioned elements has been proved beyond a reasonable doubt, and you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of the elements, or to both of the aggravating circumstances, then it will be your duty to return a verdict of not guilty.[21]

Unlike the instruction in *Roberts*, the to convict instruction in this case does not suggest that the jury may find Harris guilty of first degree murder as an accomplice.[22] Nor did the State argue at any time that Harris was guilty as an accomplice. The State's theory throughout was that Harris was the shooter.

Under *State v. Brown*, where evidence shows that a defendant facing multiple charges acted as a principal in any of the crimes charged, the difference between "a crime" and "the crime" in the accomplice instruction is harmless with respect to those

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[21] (Emphasis Added.)

[22] The only instruction that permitted the jury to convict Harris as an accomplice was instruction 10, the to convict for first degree *felony* murder. Because the jury found Harris guilty of the greater crime of first degree aggravated murder, it did not need to reach this issue or consider this instruction. (Emphasis added.) We assume the jury follows the court's instructions. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

charges.[23] In this case, substantial evidence supports the jury's finding that Harris was the principal shooter. A Murdock's patron testified that she observed Harris watching Vivas who had a noticeably large amount of money and was wearing a valuable necklace. Mihalcea testified that Vivas left the bar immediately after Harris and went in the same direction, and that seconds later he heard a gunshot. A witness testified that he saw a person matching Harris' description standing over Vivas' body immediately after the shooting. Police found Vivas' necklace, wallet, and a spent shell casing belonging to the gun used in the murder in the car in which Harris and his codefendants were riding on the evening of the murder. Finally, Harris had blood on his socks, shirt, and coat, and blood found on Harris' pant leg matched Vivas' blood DNA profile. Thus, under *State v. Brown*, the error in the accomplice instruction was harmless because the State proved Harris acted as a principal in the murder, and the evidence supports his conviction of first degree murder.

III. Did the to convict instruction erroneously permit the jury to attribute aggravating factors to Harris even if they were committed by a codefendant?

"[A] defendant's culpability for an aggravating factor cannot be premised solely upon accomplice liability for the underlying substantive crime absent explicit evidence of the Legislature's intent to create strict liability. Instead, any such sentence

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[23] *Brown*, 147 Wn.2d at 341-42.

enhancement must depend on the defendant's own conduct."[24]

Harris asserts that because the aggravating factors were written in the passive voice, the instruction impermissibly allowed the jury to attribute aggravating factors to him even if they were actually committed by one of his codefendants. He argues that similarly worded aggravating factors were rejected as erroneous in *Roberts* and *In re Howerton*.[25] In response, the State contends that because the to convict instruction required the jury to find that Harris pulled the trigger, it also had to find the aggravating factors that followed in the same instruction were directly attributable to him. We agree with the State because the instructions given in this case are different from those given in *Howerton* and *Roberts*, and the concerns discussed in those cases are not present here.

First, the to convict instructions in *Howerton* permitted the jury to convict the defendant of first degree premeditated murder under accomplice liability theory.[26] The jury found Howerton guilty of

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[24] *In re Howerton*, 109 Wn. App. 494, 501, 36 P.3d 565 (2001) (citing State v. McKim, 98 Wn.2d 111, 117, 653 P.2d 1040 (1982)).

[25] 109 Wn. App. 494, 36 P.3d 565 (2001).

[26] In *Howerton*, the to convict instruction stated:

> To convict the defendant of the crime of Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 1st day of May, 1994, *the defendant or an accomplice* shot Wilder Eby;

first degree premeditated murder, and by special verdict found that two aggravating factors existed: (1) that the defendant *or an accomplice* committed the murder to conceal the commission of a crime or to protect or conceal the identity of a person committing a crime, and (2) the murder *was committed* in the course of, in furtherance of, or in immediate flight from a robbery in the first or second degree or a kidnapping in the first degree. Although the jury found the defendant guilty of the charge, it was not required to state its reasoning. Therefore, it is impossible to know whether the jury convicted Howerton as a principal or an accomplice.

In contrast, there was no indication in the evidence presented or the State's argument to the jury on that evidence and the to convict instruction which hinted that the jury could convict Harris as an

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(2) That the *defendant or an accomplice* acted with the intent to cause the death of Wilder Eby;

(3) That the intent to cause death was premeditated;

(4) That Wilder Eby died as a result of *defendant's or an accomplice's* acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these[ ] elements, then it will be your duty to return a verdict of not guilty.

(Emphasis added.)

accomplice. As in *State v. Stovall* "as this case was tried and argued, the jury was aware that [any] accomplice liability had to be based on the specific crime charged."[27]

Second, because the jury in *Howerton* could have found Howerton guilty as a principal or an accomplice, it was imposible to know whether the jury attributed the first aggravating factor to him solely on the basis of his complicity in the crime or because of his own conduct. For example, the jury could have found that Howerton was guilty of first degree murder as an accomplice and the first aggravating factor applied to him based only on the fact that his accomplice (the principal) committed the murder to conceal the commission of the crime, without any evidence that Howerton shared the same mens rea.[28] Because the jury could have found an aggravating factor without finding that it specifically applied to Howerton, we concluded the instruction was erroneous under *State v. McKim*.[29]

In this case, the jury could not reasonably have found an aggravating factor without finding that it specifically applied to Harris. The jury found beyond a reasonable doubt that Harris committed the murder and that "the murder was committed to conceal the commission of the crime or to protect or

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[27] *State v. Stovall*, 115 Wn. App. 650, 658, 63 P.3d 192 (2003).

[28] *Howerton*, 109 Wn. App. at 501.

[29] *Id.* at 501-02 (citing *McKim*, 98 Wn.2d 111 (holding that aggravating factors must be specifically attributable to the defendant)).

conceal the identity of any person committing the crime." Because the case was tried and argued only on the theory that Harris actually pulled the trigger, even if his codefendants shared the motivation, Harris' state of mind is the only mens rea that was relevant to the question whether the murder was committed to conceal or further a crime.[30] Whether or not the jury believed that his codefendant shared his motivation, the fact that Harris himself committed the murder is sufficient evidence that he shared in their state of mind.

Third, the *Howerton* court reasoned that the jury could have concluded that the defendant was guilty of first degree murder as an accomplice and find the second aggravating factor existed even if Howerton's accomplice committed the robbery without Howerton's participation. Because this factor focused on Howerton's acts, we determined the deficiency in language was harmless if sufficient evidence implicated Howerton in the robbery. That would assure that the jury did not find Howerton guilty of the second aggravating factor based on the conduct of an accomplice.[31] Applying that reasoning in this case, we conclude that the jury correctly found Harris guilty of the second aggravating factor because the same evidence that supports the jury's finding on the first aggravating factor implicates him directly in the robbery.

Finally, we reject Harris' argument that the instructions in this case are erroneous under

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[30] *Stovall*, 115 Wn. App. at 658.

[31] *Id.*

Roberts. First, as discussed the evidence and argument on the murder charge and the aggravating factors in this case specifically required the jury to find Harris guilty as a principal. That was clearly not the case in *Roberts*. Second, although we acknowledged that the issue in *Roberts* was essentially the same as that in *Howerton*,[32] we also concluded that because the court's analysis in *Roberts* was so focused on the death penalty aspect of the case, its holding is limited.[33] We noted that our analysis in *Howerton* is consistent with *State v. McKim*, which is more directly on point.[34] We adopt the same reasoning here.

In sum, we conclude that the instructions in this case do not violate the principles set forth in *State v. McKim*, because the jury could not attribute aggravating factors to Harris based on the acts of an accomplice.

IV. Did instruction 7, which listed the aggravating factors, fail to ensure jury unanimity beyond a reasonable doubt in

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[32] *Id.* at 505.

[33] In *Roberts*, the court stated:

> [W]e hold when jury instructions as used in this case allow for the possibility that the defendant was convicted solely as an accomplice to premeditated first degree murder, *the defendant may not be executed* unless the jury expressly finds (1) the defendant was a major participant in the acts that caused the death of the victim, and (2) the aggravating factors under the statute specifically apply to the defendant.

Roberts, 142 Wn.2d at 508-09 (emphasis added).

[34] *Howerton*, 109 Wn. App. at 505.

violation of Harris' state constitutional right to unanimous jury verdicts and his federal constitutional right to a fair trial?

A personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue.[35] Although Harris argues that this court's opinion on direct appeal did not resolve any of his pro se issues, the State correctly refutes his contention. On direct appeal we said:

> Harris argues in his pro se supplemental brief that the trial court failed to provide a unanimity instruction to the jury on the aggravating factor that "[t]he murder was committed to conceal the commission of the crime or to protect or conceal the identity of any person committing the crime." But unanimity instructions are unnecessary if substantial evidence supports each alternative means of committing the charged offense. See, e.g., *State v. Fortune*, 128 Wash.2d 464, 467, 909 P.2d 930 (1996). Under the facts proved at trial, the jury could reasonably find that the murder was committed quickly and in a relatively hidden location in order to conceal the crime, as well as its perpetrators.[36]

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[35] *In re Personal Restraint of Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994); *In re Taylor*, 105 Wn.2d at 688.

[36] *State v. Sawyer*, No. 39987-0-I, 1999 WL 619075, at *9 n.46 (Wash. Ct. App. Aug. 16, 1999), *review denied*, 140 Wn.2d 1002 (2000).

Harris does not present any reason why we should reconsider this issue in the interest of justice, so we decline to review it.

V. Did a codefendant's lawyer's comment on Harris' assertion of his right to remain silent require reversal?

Comments by the prosecutor on a defendant's failure to testify are errors and may require reversal.[37] Comments made by counsel for a codefendant can also, under certain circumstances, deprive a non-testifying defendant of a fair trial.[38] The defense bears the burden of establishing the impropriety and prejudicial effect of the comments.[39] "'Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.'"[40] Comments made by co-counsel are normally less prejudicial than comments made by the State because, while the State is trying to convict the defendant, co-counsel is usually only arguing his own client's defense.[41]

Harris objects to Sawyer's attorney's remark about his own client's willingness to talk to police. His lawyer stated, "[Sawyer] just said [to the police], "'I want to talk with you.' He didn't exercise his

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[37] *State v. Dickerson*, 69 Wn. App. 744, 747, 850 P.2d 1366, *review denied*, 122 Wn.2d 1013 (1993).

[38] *Id.*

[39] *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

[40] *Dickerson*, 69 Wn. App. at 747 (quoting *Hoffman*, 116 Wn.2d at 93).

[41] *Id.* at 749.

absolute right to remain silent and to not cooperate with their investigation but instead talk with them." Harris argues that because he exercised his right to remain silent, co-counsel's statement reflected poorly on him. We reject Harris' argument for several reasons. First, Sawyer's attorney did not comment directly on Harris' silence; instead, he discussed only his own client's actions. Second, the jury was already aware that while Sawyer willingly spoke with police, Harris exercised his right to remain silent. Mentioning a fact known to the jury is unlikely to cause substantial prejudice,[42] and Harris fails to meet his burden of showing how the allegedly improper comment prejudiced him.[43]

VI. Did the trial court err by failing to give a cautionary instruction after dismissing aggravated murder charges against Johnston?

"Ordinarily, when the jury learns of a codefendant's guilt for the same or similar offenses, and the defense counsel does not request that a curative instruction be given, the failure of the trial judge to give one will not require reversal."[44] This rule also applies to a prosecutor's motion to dismiss

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[42] *Id.*

[43] The State points out the record shows the statement did not prejudice Harris because a third codefendant in this crime did not talk to the police and thejury acquitted him. It argues that it is difficult to see "how Sawyer's closing arguments could have prejudiced Harris but not Johnston."

[44] *United States v. DeLucca*, 630 F.2d 294, 299 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981).

charges against a codefendant.[45] Only in rare situations when other circumstances have exacerbated the prejudice will the court's failure to instruct constitute reversible error.[46] To assess whether there was error in failing to instruct in a case, the appellate court must carefully examine all the facts and circumstances of the case in their proper context.[47] It must consider several factors, including

> the way in which the dismissal is brought to the jury's attention, the purpose and motivation for doing so, the emphasis placed on the codefendant's dismissal relative to the substantive aspects of the case, and the defense counsel's conduct with respect to the trial proceedings (i.e, whether his actions invited the announcement, whether he objected to it or demanded an instruction, or whether he refused to do so for tactical reasons).[48]

If the factors suggest the trial court was not required to give an instruction on its own initiative, the error requires reversal only if other aggravating circumstances require it.[49]

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[45] *See Id.*

[46] *Id.* (citing *United States v. Harrell*, 436 F.2d 606, 617 (5th Cir. 1970)).

[47] *DeLucca*, 630 F.2d at 299; *United States v. King*, 505 F.2d 602 (5th Cir. 1974).

[48] *DeLucca*, 630 F.2d at 299.

[49] *Id.*

Harris argues that the trial court's failure to instruct the jury about why it dismissed aggravated murder charges against one of Harris' codefendants permitted the jury to infer that the court determined that Johnston was not guilty of that crime while the two remaining defendants were guilty of it. He claims that each of the factors listed above favor giving an instruction in this case: (1) the court did not tell the jury about the dismissal, but the jury discovered it when the instructions pertaining to Johnston included only the lesser charge; (2) Harris' attorney inadvertently failed to request the instruction for a non-tactical reason; and (3) nothing Harris or his attorney did contributed to or necessitated the dismissal. The State argues that the court is not required sua sponte to provide a curative instruction unless there is some other prejudice caused by the dismissal, which is not the case here. We agree with the State.

First, none of the factors suggest that the trial court was required to give an instruction sua sponte. The State dismissed the aggravated murder charge against Johnston because it lacked sufficient evidence to convict him. It did not dismiss the charges in the jury's presence,[50] and it did not place any emphasis on the dismissal in its case against Johnston's codefendants. The State points out that the facts in this case are less compelling than those in *United States v. DeLucca*,[51] where the Fifth

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[50] Harris seems to suggest that this fact favors a sua sponte instruction from the court but provides no support for this contention.

[51] 630 F.2d 294.

Circuit concluded a curative instruction was not necessary even though the State moved in front of the jury to dismiss all charges against two codefendants of five charged. The codefendants' attorneys requested a mistrial (not a curative charge[52]), and the trial court concluded there was no prejudice to the remaining defendants, denied the motion, and gave no curative instruction.[53] The Fifth Circuit held that it was not plain error and, in fact, a curative instruction may have actually prejudiced the remaining codefendants by over emphasizing the dismissals. Therefore, the trial judge was not required to give an instruction unless other circumstances required one.[54]

Second, Harris fails to suggest any additional circumstances that show he was substantially prejudiced by the failure to instruct. In fact, the record suggests that these factors are absent in this case because the trial court instructed the jury that it must presume all defendants innocent and consider all the evidence as to each defendant, and the State did not do anything to influence the jurors.[55]

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[52] The court stated that Delucca's attorney made a tactical decision not to request an instruction because its effectiveness was vitiated by the inherent prejudice in the State's motions.

[53] *DeLucca*, 630 F.2d at 297.

[54] *Id.* at 299.

[55] The *DeLucca* court found these facts persuasive in concluding that no aggravating circumstances were present in that case. *Id.*

VII. Did Harris' attorney's failure to request a curative instruction constitute ineffective assistance of counsel?

A criminal defendant has a constitutional right to effective assistance of counsel at trial[56] and on appeal of a criminal conviction.[57] To demonstrate ineffective assistance of counsel, a defendant must show defense counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[56] "Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel."[57]

Harris argues that because his trial counsel and his counsel on appeal failed to request or raise, respectively, the curative instruction discussed above, they provided ineffective assistance of counsel. The State argues the failure to request the instruction is not ineffective assistance because it could have been a valid tactical decision, trial counsel is in the best position to determine whether

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[56] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[57] *Evitts v. Lucey*, 469 U.S. 387, 395-96, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

[56] *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[57] *Id.* at 336.

the dismissal weakens the case against his client, and there is nothing in the record suggesting that the jury used the dismissal against Harris. We agree.

First, the record does not support his argument that there was no legitimate strategic or tactical reason for not requesting the instruction, so he does not meet the first prong. Second, he does not show that the motion would have been successful nor does he satisfy his burden of showing that the result of the proceeding would have been different if Harris' attorney requested the curative instruction. If his trial counsel was not ineffective, the appellate counsel cannot be ineffective for failing to raise the issue.

We affirm.

/s/ Agid, J.

WE CONCUR:

/s/ Becker, C.J. /s/ Appelwick, J.

FILED
DEC 8 2003

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of JERRY L. HARRIS, Petitioner.	NO. 74514-5 RULING DENYING REVIEW

Jerry Harris was convicted in 1996 of aggravated first degree murder, for which he was sentenced to life imprisonment without possibility of early release. Division One of the Court of Appeals affirmed the conviction on direct appeal, and this court denied review. *State v. Sawyer*, 140 Wn.2d 1002, 999 P.3d 1260 (2000).[1] Mr. Harris then filed a personal restraint petition in the Court of Appeals, but that court denied the petition in an unpublished decision. Mr. Harris now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

Mr. Harris first argues that the trial court admitted the police statement of codefendant Sawyer without limiting admission to those portions actually against Sawyer's penal interest, contrary to the rule this court adopted in *State v. Roberts*, 142 Wn.2d 471, 493-95, 14 P.3d 713 (2000). But the rule in *Roberts* applies when statements made by one perpetrator are sought to be admitted in the separate

[1] "Sawyer" was the name of one of Mr. Harris's codefendants.

trial of another perpetrator pursuant to ER 804(b)(3) (statements against interest). Sawyer's statement was not offered or admitted under this exception to the hearsay rule. Rather, the issue arose in the context of whether Mr. Harris's trial should have been severed from Sawyer's because the State sought to admit Sawyer's statement against Sawyer under ER 801(d)(2) (admission of party opponent). When a defendant's statement implicates a codefendant, the statement is inadmissible in a joint trial under ER 801(d)(2) unless it is sufficiently redacted of references to the codefendant. *Bruton v. United States*, 391 U.S. 123, 135-36, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Otherwise, severance is required. *Id.*; CrR 4.4(c)(1). The trial court here denied severance, and the Court of Appeals affirmed on direct appeal, holding that Sawyer's statement was sufficiently redacted. Mr. Harris does not show that the interests of justice require reconsideration of this issue. *See In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

Mr. Harris is correct that the Court of Appeals did not address ER 804(b)(3) on direct review, but as discussed, Sawyer's statement was not offered or admitted under that rule. Mr. Harris fails to cite any authority suggesting that the *Roberts* rule applies when a statement is admitted in a joint trial only under ER 801(d)(2). Mr. Harris rightly observes that Sawyer's statement was not admissible against *him* (Mr. Harris) under ER 801(d)(2), but the trial court properly instructed the jury not to consider the statement as evidence against him.

Next, relying again on *Roberts*, Mr. Harris contends that the trial court erred in its accomplice

liability instruction by referring to "a" crime rather than "the" crime. He is correct. *See State v. Roberts*, 142 Wn.2d at 509-13; *State v. Cronin*, 142 Wn.2d 568, 578-80, 14 P.3d 752 (2000). But the error is not reversible on direct appeal if it appears beyond a reasonable doubt that it did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). And since this is a personal restraint petition, Mr. Harris bears the burden of demonstrating actual and substantial prejudice. *In re Lord*, 123 Wn.2d at 303. He does not do so. The "to convict" instruction required the jury to specifically find that Mr. Harris (not Mr. Harris or one to whom he was accomplice) shot the victim and that he did so with intent to cause the victim's death. The evidence at trial pointed to Mr. Harris as the shooter, and the prosecutor argued throughout that only Mr. Harris was the shooter.

Contrary to Mr. Harris's argument, the evidence of principal liability need not be uncontroverted in order to find the error harmless. Although this court in *Brown* cited that as one example of harmlessness, undisputed evidence is not the only basis for finding lack of prejudice. *State v. Berube*, No. 71616-1, slip op. at 6-7 n.2 (Wash. Nov. 13, 2003). The entire record must be examined. *Brown*, 147 Wn.2d at 341. Mr. Harris fails to show, in light of the whole record, that the instructional error prejudiced him.

Mr. Harris also argues that, in conflict with *Roberts*, the instructions improperly allowed the jury to find him guilty of aggravated first degree murder without finding that the aggravating factors applied specifically to him. *See Roberts*, 142 Wn.2d at 508-

09; *see also In re Howerton*, 109 Wn. App. 494, 501-02, 36 P.3d 565 (2001). But *Roberts* and *Howerton* come into play on this issue only when the instructions, coupled with the evidence and argument, leave open the possibility that the defendant was convicted solely as an accomplice to the murder. As discussed above, the only reasonable possibility is that the jury found Mr. Harris to be the principal in the crime. And the "to convict" instruction was worded in such a way that the jury necessarily attributed the aggravating factors directly to Mr. Harris. Mr. Harris does not persuade me that the Court of Appeals erred on this point.

Finally, Mr. Harris contends that Sawyer's attorney committed prejudicial misconduct by commenting on Mr. Harris's exercise of his right to remain silent. But the attorney did so only indirectly, noting that Sawyer, when arrested, did not remain silent but cooperated with the police. Mr. Harris does not demonstrate actual and substantial prejudice.

In sum, the Court of Appeals did not err in denying Mr. Harris's personal restraint petition, nor are there any other grounds for review under RAP 13.5(b). Accordingly, the motion for discretionary review is denied.

/s/ Geoffrey Crooks

COMMISSIONER

December 8, 2003

FILED
FEB 4 2004

THE SUPREME COURT OF WASHINGTON

Personal Restraint Petition of	**ORDER**
JERRY L. HARRIS,	NO. 74514-5
Petitioner.	C/A No. 48450-8-I

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Ireland, Chambers and Fairhurst, considered this matter at its February 3, 2004, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 4th day of February, 2004.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

FILED
JUL 27 2004

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of JERRY L. HARRIS, Petitioner.	NO. 75191-9 RULING DISMISSING PERSONAL RESTRAINT PETITION

Jerry Harris was convicted in 1996 of aggravated first degree murder, for which he was sentenced to life imprisonment without possibility of early release. Division One of the Court of Appeals affirmed the conviction on direct appeal, and this court denied review. *State v. Sawyer*, 140 Wn.2d 1002, 999 P.2d 1260 (2000).[1] Mr. Harris then filed a personal restraint petition in the Court of Appeals, but that court denied the petition in an unpublished decision. This court denied discretionary review. Mr. Harris has now filed a second personal restraint petition directly in this court, arguing that the validity of his conviction and sentence is affected by recent appellate decisions. Now before me for determination is whether to dismiss the petition or refer it to the court for consideration on the merits. RAP 16.5(b); RAP 16.11(b).

Mr. Harris filed this petition more than one year after his judgment and sentence became final. It is therefore untimely unless it is based solely on

[1] "Sawyer" was the name of one of Mr. Harris's codefendants.

grounds for relief listed in RCW 10.73.100, or unless the judgment and sentence is invalid on its face or was entered without competent jurisdiction. *In re Stoudmire*, 141 Wn.2d 342, 349-51, 5 P.3d 1240 (2000). Mr. Harris asserts two grounds for relief. First, he argues that the admission of codefendant Sawyer's statement to police violated his constitutional right of confrontation. Second, he contends that the instructions erroneously allowed the jury to find him guilty of aggravated first degree murder without finding that the aggravating factors applied specifically to him.

To avoid the one-year limit on collateral attack concerning his confrontation argument, Mr. Harris contends that a "significant change in the law" occurred with the Supreme Court's opinion in *Crawford v. Washington*, __ U.S. __, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *See* RCW 10.73.100(6). The Court in *Crawford* held that the admission of a testimonial statement violates the Confrontation Clause of the federal constitution when the person who made the statement is not available for cross-examination. *Crawford* may indeed be a "change in the law," because the Court departed from precedent that had held such statements admissible if they fell within firmly rooted hearsay exceptions or bore other indicia of reliability. *Crawford*, 124 S. Ct. at 1370-71; *see In re Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000) (change in law occurs if intervening appellate decision effectively overturns prior decision originally determinative of material issue).

But the exception to the time limit applies only if the change is also "material" to the petitioner's case. RCW 10.73.100(6). *Crawford* is

limited to statements admitted *against* a defendant in violation of the Confrontation Clause. Sawyer's statement was not offered or admitted against Mr. Harris but was admitted at the joint trial only against Sawyer, as an admission of a party opponent. *See* ER 801(d)(2). The trial court properly instructed the jury not to consider the statement as evidence against Mr. Harris. A confrontation issue would arise if the statement facially incriminated Mr. Harris. *See Bruton v. United States*, 391 U.S. 123, 135-36, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *Richardson v. Marsh*, 481 U.S. 200, 208-11, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). But the trial court redacted references to Mr. Harris, and the Court of Appeals determined on direct appeal that the statement was sufficiently cleansed to avoid a Confrontation Clause violation. Mr. Harris again tries to argue that the statement directly implicated him, but he does not show that the interests of justice require reconsideration of this issue. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

Crawford is therefore not "material" to Harris's case and thus does not trigger the "change the law" exception to the time limit on collateral attack. This means also that the petition is not based solely on exempt grounds for relief, and on that basis it must be dismissed. *In re Hankerson*, 149 Wn.2d 695, 702-03, 72 P.3d 703 (2003).

Accordingly, the personal restraint petition is dismissed.

/s/ Geoffrey Crooks
COMMISSIONER

July 27, 2004

FILED
OCT 5 2004

THE SUPREME COURT OF WASHINGTON

Personal Restraint Petition of JERRY L. HARRIS, Petitioner.	**ORDER** NO. 75191-9

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Ireland, Chambers and Fairhurst, (Justice Bridge sat for Justice Ireland) considered this matter at its October 5, 2004, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 5th day of October, 2004.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

FILED
MAR 14 2005

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of JERRY L. HARRIS, Petitioner.	NO. 76096-9 RULING DISMISSING PERSONAL RESTRAINT PETITION

Jerry Harris was convicted in 1996 of aggravated first degree murder, for which he was sentenced to life imprisonment without possibility of early release. Division One of the Court of Appeals affirmed the conviction on direct appeal, and this court denied review. *State v. Sawyer*, 140 Wn.2d 1002, 999 P.2d 1260 (2000).[1] Mr. Harris then filed a personal restraint petition in the Court of Appeals, but that court denied the petition in an unpublished decision. This court denied discretionary review. Mr. Harris filed a second personal restraint petition directly in this court, arguing that the validity of his conviction and sentence was affected by recent appellate decisions. But finding that the petition was not based solely on grounds for relief exempt from the one-year time limit on collateral attack, I dismissed the petition. Mr. Harris then filed the present petition, raising what he claims to be the one ground for relief exempt from the time limit. Now

[1] "Sawyer" was the name of one of Mr. Harris's codefendants, who was convicted of first degree felony murder.

before me for determination is whether to dismiss the petition or refer it to the court for consideration on the merits. RAP 16.5(b); RAP 16.11(b).

Mr. Harris argues that the instructions erroneously allowed the jury to convict him of aggravated first degree murder without finding that the aggravating factors applied specifically to him. To avoid the one-year time limit on collateral attack, Mr. Harris contends that a "significant change in the law" occurred with the decisions in *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), *In re Howerton*, 109 Wn. App. 494, 36 P.3d 565 (2001), and *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). *See* RCW 10.73.100(6).[2] In *Roberts*, this court overturned a death penalty because, under the instructions, the jury might have convicted the defendant of aggravated first degree murder without finding, as required, that he was a major participant in the acts that caused the death and that the aggravating factors applied specifically to him. *Roberts*, 142 Wn.2d at 500-09. In *Howerton*, the Court of Appeals applied similar principles to a non-capital aggravated first degree murder conviction. And in *Thomas*, this court held that, when such an instructional error occurs, the aggravated first degree murder conviction (but not the underlying first degree murder conviction) is automatically reversible. *Thomas*, 150 Wn.2d at 849-50.

But in his previous personal restraint petition in the Court of Appeals, Mr. Harris raised the same

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[2] Mr. Harris also argues that, in light of these decisions, his sentence of life without possibility of early release is "in excess of the [trial] court's jurisdiction." RCW 10.73.100(5).

Roberts and *Howerton* argument, and the court found it meritless. *In re Harris*, noted at 118 Wn. App. 1021, slip op. at 11-15 (2003). And in denying discretionary review, I found no error in the Court of Appeals treatment of this issue. No. 74514-5. So even if *Roberts* and *Howerton* changed the law for purposes of the time limit on collateral attack, Mr. Harris must show good cause for raising this issue again. RAP 16.4(d).

Mr. Harris argues that *Thomas* provides good cause. He contends that, in rejecting his previous personal restraint petition, both the Court of Appeals and I found that the instructions were erroneous but that the error was harmless. Mr. Harris reasons that, since *Thomas* held that such error is never harmless, this issue should be revisited. *See In re Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001) (previously rejected claim may be raised again if there is an intervening change in law or some other justification for not having raised a crucial point previously).

But Mr. Harris mischaracterizes the rulings on his previous personal restraint petition. The Court of Appeals found *accomplice liability instructions* erroneous under *Roberts* and held that the error was harmless. *Harris*, slip op. at 7-11. But consistent with *Roberts*, the court separately discussed the claimed defect in Mr. Harris's aggravating factor and "to convict" instructions. *See Roberts*, 142 Wn.2d at 500-09. As to the latter, the court "reject[ed] Harris' argument that the instructions in this case are erroneous under Roberts," and it further "conclude[d] that the instructions in this case do not violate the principles

set forth in *State v. McKim*[, 98 Wn.2d 111, 653 P.2d 1040(1982)]," on which *Howerton* was based. *Harris*, slip op. at 14-15. The court thus engaged in no harmless error analysis as to these instructions. And in denying review, I agreed that under the instructions the jury necessarily determined that Mr. Harris personally committed the murder and necessarily attributed the aggravating factors directly to him.

Thus, even assuming, without deciding, that *Thomas* "changed the law," it is not material to Mr. Harris's case. And Mr. Harris does not show that the interests of justice otherwise require reexamining whether the instructions were erroneous under *Roberts* and *Howerton*.

Finally, even if *Thomas*'s rule of per se reversibility is a new rule, it cannot be applied to Mr. Harris's final judgment and sentence unless sit is retroactive. RCW 10.73.100(6). Mr. Harris does not persuasively show that the rule should apply retroactively. He contends that, because *Roberts* (and by extension, *Thomas*) concerned the interpretation of the accomplice liability statute, *Thomas* relates back to the effective date of that statute. But the rule at issue here-that error in the aggravating factor and "to convict" instructions is automatically reversible-involves no statutory interpretation. Other than this meritless "relation back" argument, Mr. Harris does not explain why *Thomas* should apply retroactively.

In sum, Mr. Harris's personal restraint petition is procedurally barred. The petition is therefore dismissed.[3]

/s/ Geoffrey Crooks

COMMISSIONER

March 14, 2005

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[3] Because Mr. Harris does not overcome procedural barriers, I need not address whether *Thomas*'s rule of per se reversibility, applied on direct appeal, is also applicable on collateral review. *See In re St. Pierre*, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992) (error that is reversible per se on direct appeal not necessarily automatically reversible on collateral review).

FILED
JUN 1 2005

THE SUPREME COURT OF WASHINGTON

Personal Restraint Petition of JERRY L. HARRIS, Petitioner.	**ORDER** No. 76096-9

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Chambers and Fairhurst, considered this matter at its June 1, 2005, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 1st day of June, 2005.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

28 U.S.C. § 2244. Finality of Determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on anew rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence

that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the dist5rict court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application

shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement

unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court

proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an

appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Wash. Rev. Code 10.73.090. Collateral Attack – One Year Time Limit

(1) No Petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the Unites States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

Wash. Rev. Code 10.73.100. Collateral Attack – When One Year Limit Not Applicable

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

111 (4) Sept 11, 08

NO. 08-76

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2008

KAREN BRUNSON, SUPERINTENDENT
CLALLAM BAY CORRECTIONS CENTER

Petitioner,

vs.

Jerry L. Harris,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Sheryl Gordon McCloud
LAW OFFICES OF SHERYL GORDON MCCLOUD
1301 Fifth Avenue, Suite 3401
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Counsel of Record
for Jerry L. Harris

QUESTION PRESENTED

Whether a petitioner is entitled to equitable tolling of 28 U.S.C. § 2244(d)'s one-year time limit for filing his habeas corpus petition, for relying upon then-controlling authority of *Dictado v. DuCharme*, 244 F.3d 724 (9th Cir. 2001) – which held that Washington successor post-conviction petitions statutorily toll the time for filing – when *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), overruled *Dictado* following that detrimental reliance?

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JURISDICTION

The Ninth Circuit U.S. Court of Appeals issued its opinion on February 8, 2008. Pet. App. 1a-13a. Its order denying the Petition for Rehearing *En Banc* was filed on March 14, 2008. Pet. App. 14a. This Court extended the time for filing the petition for writ of certiorari until July 14, 2008. The state's petition was timely filed under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. OVERVIEW OF STATE COURT TRIAL

Jerry Harris, along with codefendants Michael Sawyer and Brett Johnson, was charged with aggravated murder in the first degree, contrary to Wash. Rev. Code 10.95.020 and 9A.32.030, in October of 1995. They were charged in the alternative with felony murder in the first degree. Following a jury trial, Harris was found guilty of aggravated murder in the first degree; Sawyer was found guilty of first-degree felony murder; and special verdicts were entered finding each was armed with a deadly weapon. Harris was sentenced to life in prison without possibility of parole.

There was, however, no conclusive testimony or finding about which defendant was the one who premeditated, or pulled the trigger, or undertook the aggravating factors that elevated this from first degree murder (punishable by a term of years) to aggravated murder (punishable by life

without possibility of parole). Instead, the evidence placed both Mr. Harris and a codefendant at the scene of the murder, from which a gunshot was heard, by a witness who gave a description of two assailants – a description that changed over time. The evidence also showed that the car in which Mr. Harris and the two codefendants were arrested contained personal property of the deceased, thus providing circumstantial evidence of a robbery motive by at least one of those men.

The admissible evidence thus contained nothing directly proving that Mr. Harris premeditated or shot victim Renee Vivas, that he robbed Mr. Vivas (one aggravating factor elevating the murder to aggravated murder and life without parole) or that he planned witness or crime concealment (the other aggravating factor).

The critical direct evidence that Mr. Harris premeditated and committed the murder, and that he was responsible for the aggravating factors of robbery and crime or witness concealment, was out-of-court, self-serving statements by codefendant Sawyer, to law enforcement, during interrogation, admitted into evidence through the testimony of law enforcement witnesses. Mr. Harris' habeas petition therefore presented constitutional issues concerning the admission of those out-of-court, testimonial, declarations of non-testifying codefendant Sawyer which

minimized his own involvement and inculpated Mr. Harris, along with other claims.

II. DIRECT APPEAL

Mr. Harris' conviction was affirmed on direct appeal. *State v. Sawyer,* 1999 Wash. App. LEXIS 1487 (1999), *review denied*, 2000 Wash. LEXIS 152 (2000) (Pet. App. 31a).

III. STATE POST-CONVICTION PROCEEDINGS AND FACTS RELEVANT TO EQUITABLE TOLLING

Mr. Harris then filed a timely, first, personal restraint petition or PRP on February 20, 2001. It was denied by the Court of Appeals in CA No. 48450-8-I on August 25, 2003. Pet. App. 32a-58a. His Motion for Discretionary Review was denied in Wash. S. Ct. No. 74514-5 on December 8, 2003. Pet. App. 59a-62a. A Motion to Modify was denied on February 4, 2004. Pet. App. 63a. A key reason for the denial of relief on the claims concerning accomplice liability for aggravating factors was that any jury instruction error on these factors was harmless.

Immediately before the February 4, 2004, denial of relief, however, the state Supreme Court granted relief on a similar jury instruction claim and ruled that prejudice from such an error must be presumed when (as in this case) it affects aggravating factors. Since that decision (*State v. Thomas*, 150 Wash.2d 821, 83 P.3d 970 (2004)) was so new, it had not been put in

any of the briefing in Mr. Harris' case. A new PRP was therefore filed (on March 4, 2004) to bring that new *Thomas* decision to the state Supreme Court's attention. Mr. Harris combined his *Thomas* argument with claims arising under *Crawford v. Washington*, 541 U.S. 36 (2004). That PRP was dismissed as "mixed" on July 27, 2004, for containing both timely and untimely claims (Pet. App. 64a-66a) – a dismissal that does not preclude refiling under Washington law. *In re the Personal Restraint of Hankerson*, 149 Wn.2d 695, 72 P.3d 703 (2003).

Mr. Harris therefore filed a third PRP presenting only the *Thomas* issue, to avoid dismissal as a "mixed" petition. It was filed on October 11, 2004; it was denied by a Commissioner on March 14, 2005 (Pet. App. 68a); and a Motion to Modify was denied on June 1, 2005 (Pet. App. 73a).

IV. THE HABEAS CORPUS PETITION

Mr. Harris filed his habeas petition in federal court on May 11, 2005, in advance of the final Washington Supreme Court denial. The district court dismissed the petition as time-barred. Pet. App. 16a. It acknowledged that the habeas petition would have been timely under prior, controlling, Ninth Circuit law – because in *Dictado v. Ducharme*, 244 F.3d 724, decided in 2001, the Ninth Circuit held that successor state-court PRP's in Washington toll the time for filing a federal habeas petition, even if the PRP's are later

determined to have been procedurally defective under Washington law.

Mr. Harris' petition was clearly timely under *Dictado*. As the state and the district court acknowledged, Mr. Harris filed each PRP shortly after the previous one was denied; each PRP was based on new and controlling law and not on authority that could have been raised earlier; and Mr. Harris immediately filed his federal habeas corpus petition after losing on his final state PRP – in fact, he filed a couple of weeks earlier, anticipating the final denial, when *Pace* was decided. Those dates show that Mr. Harris was not sleeping on his rights during any of the time preceding his federal filing.

This Court, however, overruled *Dictado* four years after it was decided in *Pace v. DiGuglielmo*, 544 U.S. 408, decided in 2005. In *Pace*, this Court ruled for the first time that successor state post-conviction petitions which are later determined to have been untimely filed do *not* toll the time for filing a federal habeas corpus petition under § 2244(d)(2).

In Mr. Harris' case, the district court ruled that statutory tolling was therefore unavailable. That much of its decision was correct under *Pace*.

It continued, however, that although the equitable tolling doctrine applied, Mr. Harris could not meet its prerequisites. It reasoned that reliance upon controlling authority did not make it impossible for Mr. Harris to file earlier, even though it recognized that Mr. Harris' counsel acted

"presumably in reliance on precedent at that time." The district court explained that reliance on controlling Ninth Circuit authority does not warrant equitable tolling:

> Petitioner Harris appeals from a denial of his claims as time-barred, a procedural ground. The court interprets Harris' pleadings as acknowledging that the claims are barred under *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), whereas they would have been timely under the prior Ninth Circuit authority. *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001).
>
> Petitioner Harris asks the court to hold that he is entitled to equitable tolling of the statute of limitations found in the AEDPA due to the change in controlling authority. While the court recognizes the harshness of the result, the situation before the court does not meet the high burden for equitable tolling established by the Ninth Circuit. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Petitioner Harris could have filed a timely petition but did not *presumably in reliance on precedent at the time*. This does not meet the "impossibility test" established in equitable tolling cases. ...

Order Denying Certificate of Appealibility, pp. 2-3 (emphasis added).

As the emphasized material shows, there is no factual dispute here. The district court acknowledged – and the state has never disputed – that the "delay" in filing was due to reliance upon controlling Ninth Circuit precedent.

The Ninth Circuit reversed. Pet. App. 1a-13a. It ruled that the time for filing Mr. Harris' habeas corpus petition should be equitably tolled for the period of counsel's reliance upon then-controlling Ninth Circuit

authority, to Mr. Harris' detriment.

SUMMARY OF ARGUMENT

As the state candidly admits in its petition, there is no conflict in the circuits over whether the time for filing a habeas corpus petition under 28 U.S.C. § 2254 is subject to equitable tolling. All the circuits that have addressed the issue agree that the one-year time limit established in § 2244(d) is subject to equitable tolling. Section I.

In addition, there is no conflict in the circuits over whether facts similar to the ones presented here meet even the strictest prerequisites to equitable tolling. The Circuit Courts of Appeals have consistently held that reliance upon a controlling court order – or even a confusing court order, or advice from court personnel – satisfies the prerequisites to application of equitable tolling. The state has identified no dispute on this point, either. Section II.

Reliance to a petitioner's detriment on controlling circuit authority that is later overruled is a fairly rare circumstance. To the extent the state seeks review to establish general guidelines for equitable tolling, it has chosen a poor vehicle. Any decision about the scope of equitable tolling in this case would probably have limited applicability to the run of the mill tolling claims about which the state is seeking guidance. Section III.

Finally, the state never raised the issue of whether 28 U.S.C. §

2244(d)'s one-year time limit is even subject to equitable tolling in the district court or the Ninth Circuit. It took the opposite position there; it argued that the statute could be equitably tolled, but the prerequisites to tolling were not met in this case. The state should be judicially estopped from relying upon a contrary argument to gain review in this Court. Section IV.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS OVER WHETHER THE TIME FOR FILING A HABEAS PETITION UNDER 28 U.S.C. § 2244 CAN BE EQUITABLY TOLLED – ALL CIRCUITS AGREE THAT IT CAN.

There is no conflict in the circuits over whether the time for filing a 28 U.S.C. § 2254 habeas corpus petition can be equitably tolled. All eleven circuits that have considered the question agree that the one year time limit established by 28 U.S.C. § 2244(d) establishes a statute of limitations that is subject to equitable tolling. In fact, the state itself has collected those cases. Pet. at 16-18 (collecting cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits which have held that this statute of limitations is subject to equitable tolling, along with a decision from the D.C. Circuit acknowledging these holdings but declining to reach the issue).

II. THERE IS NO CONFLICT IN THE CIRCUITS OVER WHETHER FACTS SIMILAR TO THESE JUSTIFY EQUITABLE TOLLING – ALL CIRCUITS AGREE THAT IT CAN.

There is not even any conflict in the circuits over whether facts similar to the ones presented here – reliance on the order of a court – should justify equitable tolling. The Ninth Circuit has consistently held that reliance upon a controlling court order in determining when a habeas petition should be filed *does* justify equitable tolling. *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 n.5 (9th Cir. 2005), *amended*, 2002 U.S. App. LEXIS 2169 (applying equitable tolling to habeas filing deadline); *Corjasso v. Ayers*, 278 F.3d 874, 877-78 (9th Cir. 2002) (applying equitable tolling to habeas filing deadline; citing other cases in which such tolling of the habeas deadline was granted); *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (*en banc*) (district court's order that "stay of the proceedings prevented [petitioner's] counsel from filing a habeas petition and, in itself, justifies equitable tolling" was not clearly erroneous but "clearly correct"), *cert. denied*, 526 U.S. 1060 (1999), *overruled on other grounds*, *Woodford v. Garceau*, 538 U.S. 202 (2003).

The other circuit courts have also granted equitable tolling to AEDPA habeas petitioners where, as here, the petitioner relied to his detriment upon representations, actions, or decisions, of the courts, concerning the time for

filing in federal court. *E.g.*, *Prieto v. Quarterman*, 456 F.3d 511, 514-16 (5th Cir. 2006) ("Although AEDPA applied to Prieto's application, the district court's order granting him additional time for the express purpose of filing his petition at a later date was crucially misleading. *Prieto* relied on the district court's order in good faith and to his detriment when he filed his petition. As Prieto submitted his petition within the time expressly allowed him by the district court, he is entitled to equitable tolling."); *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (remanding for district court to determine whether petitioner "reasonably viewed the Ohio Supreme Court's order as granting him extra time to properly file a petition for state postconviction relief" and whether he reasonably "assumed that any time spent pursuing this avenue would toll his federal statute of limitations").

The circuit courts have granted equitable tolling to AEDPA habeas petitioners even where the law about the time for filing upon which they relied was unsettled or unclear, rather than controlling and clear (as it was in this case). *E.g.*, *York v. Galetka*, 314 F.3d 522, 528 (10th Cir. 2003) ("at the time York filed his third petition, the law in this circuit was unsettled on the issue [of whether a habeas petition is 'other collateral review' that tolls AEDPA time limit], and the statute is ambiguous ... We conclude that the district court should have applied equitable tolling to relieve York of the

one-year statute of limitations."); *Miller v. Collins*, 305 F.3d 491, 496 (6th Cir. 2002) ("In light of Miller's lack of notice [from state court that relief was denied], his diligence in pursuing his claims, and the State of Ohio's failure to argue that it will be prejudiced if this limited period of time is tolled, we hold that the section 2244 one-year statute of limitations was [equitably] tolled."); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.) ("applicable law is so confounding and unsettled"; "When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2244 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations."), *cert. denied*, 534 U.S. 944 (2001).

The Third Circuit described the predicament faced by habeas petitioners trying to timely file, in compliance with controlling law, in a similar situation, in *Banks v. Horn*, 271 F.3d 527, 534 (3d Cir. 2001), *rev'd on other grounds, Beard v. Band*, 542 U.S. 406 (2004). It explained, "In *Fahy v. Horn*, we described the state of the [post-conviction filing deadline] law at the time ... when Banks's petition was pending, as 'inhibitively opaque.' ... We noted that in *Banks*, we had required Banks to return to state court because even we believed the relaxed waiver rule might well apply.

How can we expect Banks to have predicted the ultimate ruling of the Pennsylvania Supreme Court when we could not?" *Id.* *See also Baker v. Horn*, 383 F. Supp.2d 720, 745 (E.D. Pa. 2005) ("Baker sought to present his claims to the Pennsylvania courts at a time when Pennsylvania law regarding acceptance of otherwise untimely petitions was 'inhibitively opaque' ... Therefore, Baker exercised even greater diligence ... and meets the 'reasonable diligence' requirement of equitable tolling."). *Accord Griffin v. Rogers*, 399 F.3d 626 (6th Cir. 2005).

In fact, one district court granted equitable tolling in virtually identical circumstances to those presented here – the filing of a habeas petition that would have been timely under circuit precedent but, under a new Supreme Court case decided thereafter, became untimely. The district court ruled that under controlling Second Circuit law, a prior habeas corpus petition had tolled the time for filing a second habeas petition. But a new Supreme Court decision – *Duncan v. Walker*, 533 U.S. 167 (2001) – effectively overruled that circuit precedent. The district court ruled that the *Duncan* case constituted an "extraordinary circumstance[]" warranting equitable tolling. *De Jesus v. Miller*, 215 F. Supp.2d 410, 412-13 (S.D.N.Y. 2002).

The court came to essentially the same conclusion in *In re Wilson*, 442 F.3d 872 (5th Cir. 2006). In that case, the Fifth Circuit applied equitable

tolling to extend the § 2244(d) filing period because controlling authority in the Circuit (there, the "two-forum" rule) led petitioners and counsel to delay federal habeas filing until state post-conviction was completed. That is the same thing that happened to Mr. Harris: controlling authority in the Ninth Circuit – *Dictado* – led petitioner and counsel to delay federal habeas filing until state post-conviction was completed. And there as here, the petitioner exercised diligence in meeting what he thought was the controlling deadline, by filing quickly in federal court once his state post-conviction claims were finished.

At least one court has even granted equitable tolling to a habeas petitioner due to justifiable and detrimental reliance upon prison authorities, not just courts. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) ("Miles contends the doctrine of equitable tolling precludes a finding that his habeas petition was time-barred. We agree ... as an incarcerated pro se litigant, Miles depended on prison authorities to draw on his trust account and to prepare a check for the filing fee ... [and to mail it with the petition]. Once Miles made his request, any delay on the part of prison officials ... was not within Miles' control.").

Similarly, the circuit courts have granted equitable tolling where petitioners reasonably relied to their detriment on actions of court personnel.

See Burger v. Scott, 317 F.3d 1133, 1143 (10th Cir. 2003) (granting equitable tolling where evidence showed state court had received state postconviction document but not stamped it filed for four months); *Knight v. Schofield*, 292 F.3d 709, 709-10 (11th Cir 2002) (granting equitable tolling where prisoner was assured by "Georgia Supreme Court Clerk ... that he would be notified as soon as a decision was made," but was not"); *Corjasso v. Ayers*, 278 F.3d 874, 878-90 (granting equitable tolling because of delay caused by district court clerk's office mishandling of prisoner's pro se papers).

There is simply no conflict in the circuits over whether equitable tolling applies to facts like those in Mr. Harris' case, that is, where the petitioner relies to his detriment on a controlling court order or decision. The circuits that have considered the issue hold that it does support such tolling. There is not even any conflict in the circuits over whether equitable tolling applies to petitioner's reliance upon confusing law, or even seemingly controlling pronouncements by non-judicial personnel such as prison officials and court clerks. Again, the circuits that have considered the issue hold that it does.

Even this Court has recognized that habeas petitioners may be entitled to equitable tolling if they rely to their detriment upon a court decision. In *Pliler v. Ford*, 542 U.S. 225, 234 (2004), this Court remanded to the Ninth

Circuit for a determination of whether its "concern that respondent had been affirmatively misled" by a magistrate judge warranted equitable tolling of the statute of limitations. *Id.*, 542 U.S. at 235 (O'Connor, J., concurring) ("if the petitioner is affirmatively misled ... by the court or the State ..., equitable tolling might well be appropriate"); *id.* (Stevens, J., concurring in judgment) (endorsing majority's approach of remanding to the Ninth Circuit to determine the propriety of equitable tolling).

The state's suggestion (Pet., at 26) that Mr. Harris could have easily filed his habeas petition while continuing his state post-conviction litigation by using the federal "stay and abey" procedure is incorrect. That option was not as clearly available to Mr. Harris as the state suggests. Actually, this Court's decision directing those in danger of filing their federal habeas petitions too late, because of continuing state post-conviction litigation, to file protective habeas petitions before the conclusion of the state court litigation, was *Pace v. DiGuglielmo* itself. But that was decided on April 27, 2005, well after Mr. Harris and counsel had already made the decision to follow existing Ninth Circuit precedent by filing only in state court.

Pace in turn cited to *Rhines v. Weber*, 544 U.S. 269 (2005), for the availability of the "stay and abey" procedure. *Pace*, 544 U.S. at 416. But this Court decided *Rhines* on March 30, 2005, also well after the decision to rely

on existing Ninth Circuit precedent by filing only in state court had been made in Mr. Harris' case.

This is critical, because *Rhines v. Weber* changed Supreme Court law on this point. Prior to that decision, this Court barred the "stay and abey" procedure that *Rhines v. Weber* adopted. As this Court explained of that history in *Rhines v. Weber* itself:

> Fourteen years before Congress enacted AEDPA, we held in *Rose v. Lundy*, 455 U.S. 509 ... (1982), that federal district courts may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims. We reasoned that the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims. *Id.*, at 518-519 ...
>
> Accordingly, we imposed a requirement of "total exhaustion" and directed federal courts to effectuate that requirement *by dismissing mixed petitions without prejudice* and allowing petitioners to return to state court to present the unexhausted claims to that court in the first instance. *Id.*, at 522 ....

Rhines v. Weber, 544 U.S. 269, 273-74 (emphasis added).

The argument that Mr. Harris should have availed himself of the benefit of a "stay and abey" procedure that this Court had not yet endorsed for people in his situation – a procedure barred to him by then-existing Supreme Court precedent, *i.e.*, *Rose v. Lundy*, 455 U.S. 509 – must therefore fail. A habeas petitioner cannot be expected to be prescient enough to take advantage of a filing procedure that was blocked by controlling precedent at the time he filed

his state post-conviction petition (and filed it in reliance upon existing circuit court authority).

III. THIS CASE RESTS ON THE PECULIAR CIRCUMSTANCE OF RELIANCE ON CIRCUIT PRECEDENT, LATER OVERRULED; IT IS A POOR VEHICLE FOR CRAFTING BROAD RULES ABOUT WHEN EQUITABLE TOLLING CAN APPLY.

The state argues that the petition should be granted to offer the lower courts broad guidance about whether equitable tolling applies to the habeas corpus statute of limitations and, if so, in what circumstances. Pet., at 14-15.

But the Court would never get to that question in this case. The facts of this case fall way over on the justifiable end of the equitable tolling spectrum. As discussed above, all the circuit courts that have considered whether equitable tolling should apply to facts like these – reliance upon a controlling court decision or order – have ruled that the answer is yes. If the state is looking for guidance about how the courts should proceed in the close cases, which are bogged down in a fact-intensive record, *see* Pet. at 14-15, a decision in this case will not help.

IV. THE STATE NEVER RAISED THE ISSUE OF WHETHER 28 U.S.C. §2244(d) CAN BE EQUITABLY TOLLED IN THE LOWER COURTS.

Finally, the issue of whether § 2244(d)'s time limit can be equitably tolled is not well developed in this case, because the state never raised that

issue in the courts below. Instead, it argued that the statute could be equitably tolled, but only when circumstances beyond the petitioner's control made it "impossible" to file on time.

The state took this position in the Ninth Circuit. *E.g.*, Response, p. 15 ("The statute of limitations is subject to equitable tolling ..."); Response, p. 16 ("habeas petition is untimely ... unless Mr. Harris can demonstrate he is entitled to either statutory tolling or equitable tolling under the federal statute of limitations"); Response, p. 19 ("Thus, Mr. Harris' federal habeas petition must be dismissed unless he is entitled to further tolling under equitable tolling principles. But no valid grounds for equitable tolling are present in Mr. Harris' case."); Response, p. 20 ("statute of limitations *may be tolled* where extraordinary circumstances beyond a petitioner's control made it impossible ... to file a petition on time") (emphasis added); Response, p. 24 ("He cannot show that the announcement of *Pace* constituted an external circumstance which made it impossible for him to file a timely habeas petition.") (emphasis added).[1]

---

[1] In fact, the state even acknowledged in the court below that this Court's recent decision on equitable tolling of the AEDPA statute of limitations established two prerequisites to equitable tolling: diligence in pursuing rights and an extraordinary circumstance standing in the way of filing. Response, p. 26 (discussing *Lawrence v. Florida*, 549 U.S. 327 (2007). The state took the position that those two prerequisites to equitable tolling were not satisfied in this case. Its briefs do not contain the argument that the

The state took the same position in the district court. Motion to Dismiss p., 16 ("The statute of limitations is subject to equitable tolling ..."); *id.*, p. 16 ("his habeas petition is untimely ... unless Mr. Harris can demonstrate he is entitled to either statutory tolling or equitable tolling ...."); *id.*, p. 19 ("no grounds for equitable tolling are present in Mr. Harris' case").

The state never raised the argument that equitable tolling was completely unavailable in either court below. It acknowledged that the one-year time limit was subject to equitable tolling, as the quotes above show. The state consistently argued, instead, that Mr. Harris' case did not meet the prerequisites to equitable tolling established by this Court and by the Ninth Circuit.[2]

The state is switching positions. That change in position over the course of this litigation in order to gain a tactical advantage in this Court should be rejected on the ground of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("judicial estoppel" prevents party from

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AEDPA statute of limitations cannot be equitably tolled at all.

[2] In addition, instead of arguing that the statute of limitations could not be equitable tolled, the state argued (in part) to the courts below that even under *Dictado v. Ducharme*, "his habeas petition would still clearly [have] been time-parred by the one-year federal statute of limitations." Response Brief, p. 10. *See also* Response Brief pp. 11-14, pursuing this argument. The state had their dates wrong, though, a matter that they conceded in a document filed with the Ninth Circuit shortly before oral argument.

prevailing in one phase of a case on one argument and then relying on a contradictory argument to prevail in a later phase.).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this ____ day of September, 2008.

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NO. 08-76

IN THE SUPREME COURT OF THE UNITED STATES

KAREN BRUNSON,
SUPERINTENDENT, CLALLAM BAY
CORRECTIONS CENTER,

Petitioner,

v.

JERRY L. HARRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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Other Authorities

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PETITIONER'S REPLY BRIEF

1. Harris Does Not Dispute The Primary Reasons For Granting The Writ

The Petition For A Writ Of Certiorari advanced two primary reasons for granting the writ. First, this Court has expressly left open the question of whether equitable tolling applies to the statute of limitations in 28 U.S.C. § 2244(d)(1). *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005), and *Duncan v. Walker*, 533 U.S. 167, 181 (2001). Pet. 13. Second, the decisions of the courts of appeal approving equitable tolling are inconsistent with this Court's jurisprudence. Pet. 15-23. Harris does not take issue with either of these points.

Harris argues that there is no conflict in the circuits about whether equitable tolling applies to § 2244(d)(1), and that there is no conflict about whether equitable tolling is available when a defendant, like Harris, relies to his detriment upon actions and decisions of courts. Br. Opp. 8-15. The petition acknowledged that the First through the Eleventh Circuits of the courts of appeal have ruled that equitable tolling applies to the statute of limitations in § 2244(d)(1). Pet. 13-18. In most cases, the absence of a conflict would be an important reason for denying the writ. However, in this case, there will never be a conflict in the circuits. Thus, if the Court is to resolve the question it has left open, it must grant the writ in the absence of a conflict.

2. Harris Is Not Entitled To Equitable Tolling

Harris argues that the Court should not grant review because the facts of this case clearly justify equitable tolling. Br. Opp. 17. However, as the petition explained, this case deals with more than a controlling decision of a court. Pet. 23-27. *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001), was controlling authority in the Ninth Circuit for the proposition that "if a state's rule governing the timely commencement of state postconviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.'" But, there was contrary authority in other circuits that such petitions were not properly filed. *Brooks v. Walls*, 279 F.3d 518, 524 (7th Cir. 2002); *Merritt v. Blaine*, 326 F.3d 157, 165 (3d Cir. 2003).

The Court left this question open in *Artuz v. Bennett*, 531 U.S. 4, 8 n.2 (2000). Harris made a tactical decision to rely on *Dictado*—hoping this Court would not reach the issue or would affirm *Dictado*—instead of filing a protective habeas corpus petition.

Harris argues that he could not have easily filed a protective petition and asked that it be stayed while he exhausted his state remedies because there was no procedure for this until *Rhines v. Weber*, 544 U.S. 269 (2005). Br. Opp. 15-16. In fact, the Ninth Circuit had a procedure under which a defendant could file a protective petition and pursue unexhausted claims in state court. *Jackson v. Roe*,

425 F.3d 654, 658-59 (9th Cir. 2005), explained that the Ninth Circuit

> "developed a three-step procedure applicable to petitions that contained both exhausted and unexhausted claims . . . The procedure included (1) allowing a petitioner to amend his petition to remove the unexhausted claims . . . (2) staying and holding in abeyance the amended, fully exhausted petition to allow a petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) permitting the petitioner after completing exhaustion to amend his petition once more to reinsert the newly exhausted claims back into the original petition."

Thus, before *Rhines* was decided, the Ninth Circuit had a procedure akin to stay and abeyance. *Calderon v. United States District Court*, 134 F.3d 981, 986 (9th Cir. 1998) (The district court had authority to delete unexhausted claims, stay the amended petition, and allow amendment to add newly exhausted claims.). The Ninth Circuit also allowed a defendant to stay a petition while exhausting newly discovered claims in state court. *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993) (The district court abused its discretion in denying habeas corpus petitioner's request for stay of resolution of his petition to allow petitioner, who had been sentenced to death, to exhaust his state remedies on newly identified claims.).

This case presents a good vehicle to decide whether equitable tolling applies to the statute of limitations in § 2244(d)(1) because it involves both a controlling court decision and the tactical choices of the defendant.

3. The Fact That The State Did Not Argue That Equitable Tolling Is Not Available In The Ninth Circuit Is Not A Bar To Jurisdiction

Harris argues that review should not be granted because the State did not argue below that equitable tolling did not apply to § 2244(d)(1). Br. Opp. 17-19. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). However, even if "a claim [was] not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon'". *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). In this case, the Ninth Circuit passed on the question. The court stated: "Although the Supreme Court has never explicitly decided whether § 2244(d) allows for equitable tolling, *see Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), we hold that it does, *see, e.g., Espinoza-Matthews*, 432 F.3d at 1026." Pet. 7a n.4. Indeed, the State emphasized that the Court left open the question of availability of equitable tolling. *See, e.g.*, Brief of Respondent-Appellee at 27, *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008) (No. 06-35313).

Moreover, "[a]lthough the Court generally declines to review *issues* not pressed or passed upon

by lower courts, it has allowed petitioners to make new *arguments* in support of claims properly presented below." *Supreme Court Practice* (9th ed.), at 465. In this case Harris does not dispute that the State argued that he was not entitled to equitable tolling. The argument that equitable tolling does not apply to § 2244(d)(1) is simply a new argument in support of the State's contention on this point.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

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